

No. 13057

United States
Court of Appeals
For the Ninth Circuit.

JAMES C. GIBBS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

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240 Stockton St.,

San Francisco 8, Calif.,

Proctors for Appellant.

CHAUNCEY F. TRAMUTOLO,

United States Attorney,

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Special Assistant to the Attorney General,

P. O. Bldg., San Francisco 1, Calif.,

Proctors for Appellee.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 25255-G

JAMES C. GIBBS,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

(By Amendment of Complaint)

To the Honorable the Judges of the Above-Entitled
Court:

The libel of James C. Gibbs on the U.S.S. An-
tietam, owned, managed, operated and navigated
by the United States of America, against said
owner and against all persons lawfully intervening
in its interests, in a cause of action for damages
under the Public Vessels Act, 46 U.S.C.A., alleges:

I.

That the libelant is a resident of Redwood City
in the County of San Mateo, State of California, and
resides therefore within the jurisdiction of the
above-entitled court.

II.

That the respondent, United States of America,
is a sovereign nation and a political entity that has
consented to be sued by certain persons, and that
such consent is found and contained in and granted

by the Public Vessels Act in 46 U.S.C.A., sections 781 et seq.

III.

That libelant was during all the times herein mentioned, an employee of the respondent, assigned to and employed in an executive branch of the said respondent, to wit: the Navy Department, as a first class shipfitter, and is, pursuant to the rules of the respondent above named, a permanent employee of said respondent. That said libelant alleges the fact to be that he is a person within the coverage of the said Public Vessels Act and is covered and protected by and within the terms of the said Act.

IV.

That prior to November 19, 1946, libelant was duly assigned to the performance of work upon an aircraft carrier of the respondent above named, known and called the U.S.S. Antietam, at the San Francisco Naval Shipyard, Hunters Point, San Francisco, California. That the said San Francisco Naval Shipyard is an installation of the Navy Department, one of the executive branches of the respondent above named, and that the said U.S.S. Antietam, said aircraft carrier, is wholly owned, operated, managed and navigated by and the property of and in the exclusive possession of the said respondent above named and that the said aircraft carrier, U.S.S. Antietam, and the work then and there being performed upon it and to which libelant was then and there assigned by the said respondent, was wholly and exclusively within the control and under the direction of the said respondent.

V.

That in accordance with orders and the assignment of this libelant as such employee of the respondent, this libelant was on said November 19, 1946, engaged upon said aircraft carrier *Antietam* in the performance of work and repairs assigned to him as the duties of such employee as hereinabove alleged. That while thus engaged, and at or about the hour of 10:15 a.m. of said day, and as a result of the carelessness and negligence of the said respondent, an explosion occurred upon said aircraft carrier, and that this libelant then and there, and as a result of the said carelessness and negligence of said respondent received the following personal injuries: fracture of the left os calcis, severe burns of the back, numerous bruises and abrasions of the head, hands and shins, profound shock, pain and suffering and other injuries not presently diagnosed.

VI.

That libelant is advised and believes, and therefore alleges, that his health and physical capacity have been permanently injured. That solely by reason of the premises and as a proximate result thereof, libelant has required hospitalization and surgical attention for the purpose of effecting a cure of said libelant's condition, to his special damage in a presently unascertained amount, and libelant, in this respect, alleges that the injuries will be permanent in nature and that he will be permanently disabled; libelant prays leave to amend this allegation when the facts are more particularly ascertained.

VII.

That as a result of the negligence and the carelessness of the said respondents and the injuries received by this libelant, libelant has been generally damaged in the amount of Sixty Thousand Dollars (\$60,000.00).

VIII.

That all and singular the allegations herein are true and are within the admiralty and maritime jurisdiction of the above-entitled court.

Wherefore, libelant prays that process in due form of law, according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction, may issue against said respondents, and that citation in personam may issue against respondents, and that respondents be cited and required to appear and answer, upon oath, all and singular, the matters aforesaid; and that this Honorable Court may be pleased to decree the payment by respondents to libelant of the sum of Sixty Thousand Dollars (\$60,000.00), plus special damages to be alleged, plus costs of suit herein, and such other and further relief as to the court may seem meet and proper.

/s/ MELVIN M. BELLI,

/s/ LOU ASHE,

Proctors for Libelant.

State of California,

City and County of San Francisco—ss.

James C. Gibbs, being first duly sworn, deposes and says: That he is the libelant in the above-en-

titled action; that he has read the foregoing Libel in Personam (By Amendment of Complaint) and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon information and belief, and as to those matters that he believes it to be true.

/s/ JAMES C. GIBBS.

Subscribed and sworn to before me this 13th day of September, 1948.

[Seal] /s/ MARGARET M. LYNCH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Feb. 10, 1952.

[Endorsed]: Filed September 23, 1948.

[Title of District Court and Cause.]

ANSWER OF RESPONDENT
UNITED STATES OF AMERICA

Now comes the Respondent, United States of America, and answers the libel on file herein as follows:

I.

Respondent has no information or belief as to the alleged residence of the libelant and demands strict proof thereof.

II.

Respondent admits that respondent United States of America was and is a sovereign nation and a

political entity; denies that respondent United States of America has consented to be sued herein; denies that such consent is found and contained in and granted by the Public Vessels Act in 46 U.S.C. Sections 781 et seq.

III.

Respondent admits that libelant during the times mentioned in said libel was an employee of respondent United States of America, assigned to and employed in an executive branch of respondent, to wit, the Navy Department, and in this respect alleges that prior to the 19th day of November, 1946, libelant was employed by respondent United States of America as a first class shipfitter pursuant to Acts of Congress and regulations of the United States Civil Service Commission pertaining to the employment of civilian personnel by the Department of the Navy. Answering the allegation as to permanency of employment, respondent leaves matters of law for the Court's determination. Denies the remaining allegations of said Article III.

IV.

Respondent admits the allegations of Article IV.

V.

Answering Article V respondent admits that on November 19, 1946, Libelant, in accordance with orders and assignment as an employee of respondent, was engaged upon the said USS Antietam in the performance of work and repairs assigned to

him as the duties of such employee. Denies the remaining allegations of said Article V.

VI.

Respondent denies the allegations of Article VI.

VII.

Respondent denies the allegations of Article VII, and particularly that libelant was damaged in the sum of \$60,000.00 or any part thereof.

VIII.

Respondent denies the allegations of Article VIII.

As and for a Second, Separate and Distinct Defense to the libel on file herein respondent alleges:

I.

The United States District Court does not have jurisdiction under the Public Vessels Act of 1925 (46 U.S.C. 781) of a claim of damages for injuries by a Civil Service employee of respondent United States of America within the course and scope of his employment in the performance of work upon a public vessel of the United States of America, the United States of America not having consented to be sued for such a claim.

As and for a Third, Separate and Distinct Defense to the libel on file herein respondent alleges as follows:

I.

That libelant, as a Civil Service employee of respondent United States of America, as alleged

in the libel on file herein, was an officer of the United States of America, and the remedy of libelant is covered by the provisions of Title 5, U.S.C. 751 et seq., which said statute is exclusive in the remedy therein provided to libelant in the premises.

II.

That as a beneficiary under the provisions of Title 5, U.S.C. 751 et seq., libelant received medical treatment and has continued to receive medical treatment provided by the United States Marine Hospital, San Francisco, California; that as an employee of the United States libelant received payment in full for all accumulated sick and annual leave.

III.

That subsequent to said alleged injury libelant filed a claim with the Bureau of Employees Compensation of the Federal Security Agency for disability compensation as a result of said alleged injury; that said libelant was awarded disability compensation and received regular payments in accordance with said award.

IV.

That by virtue of libelant's claim and acceptance of compensation in accordance with the provisions of Title 5, U.S.C. section 751 et seq., libelant has elected his remedy thereunder and is barred from pursuing any other remedy that he might have had.

As and for a Fourth, Separate and Distinct Defense to the libel on file herein respondent alleges as follows:

I.

That at the time and place of the event alleged in the libel herein libelant so carelessly and negligently conducted himself that any or all of the matters and things set forth in said libel were solely and proximately the result of the carelessness and negligence of libelant in the premises; that none of the injuries or damages claimed to have been sustained by libelant was the result of any carelessness or negligence on the part of any of the officers, representatives, agents or employees of the United States of America, nor were the said alleged injuries or damages sustained by reason of any insufficiency or unseaworthiness on the part of said vessel.

Wherefore, Respondent prays that the libel filed herein be dismissed, and for its costs of suit and such other and further relief as to the Court may seem meet and proper.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant United States Attorney, Proctors for Respondent United States of America.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

These seven consolidated cases are actions in tort against the United States. All of the libelants were shoreside civilian employees of the United States. On November 19, 1946, they were engaged in repairing the United States Aircraft Carrier Antietam, at San Francisco Naval Shipyard, Hunters Point. An explosion occurred and the libelants all suffered injuries.

Heretofore Judge Harris of this court decided that the actions could proceed under the Public Vessels Act, 43 Stat. 112, 46 USC 781 et seq. When the cases were called for trial, the Court, with the consent of all parties, proceeded to conduct a preliminary trial to determine whether or not the libelants had received and accepted compensation pursuant to the Federal Employees Compensation Act (hereinafter referred to as FECA) 39 Stat. 742, 5 USC 751 et seq. Witnesses testified in each of the cases as to applications for and receipt and acceptance of compensation by the libelants.

The evidence showed that six of the libelants received compensation for varying periods. One libelant, James C. Gibbs, received medical treatment and hospitalization, but no compensation.

Upon conclusion of the preliminary trial there were submitted to the court for decision the following issues:

1. Was the FECA the exclusive remedy of the libelants?

2. If it was not, was the receipt and acceptance of compensation an election of remedies on the part of libelants thus estopping them from maintaining tort actions against the United States?

Exclusiveness of Remedy

A study of the statutory system for compensating injured federal employees, as well as of the various statutes whereby the United States has consented to be sued for tort liability, and applicable decisions, is persuasive that, until the FECA was amended in 1949, it did not provide an exclusive remedy and did not prevent suits by employees of the United States under the Public Vessels Act.

Since the first federal employees compensation statute was adopted in 1908 up to the amendment of October 14, 1949, there has never been a provision in any of the compensation statutes or their amendments, either in form or effect, making the benefits thereof the exclusive remedy of federal employees. Footnoted is a chronological list of the statutes and their scope. *¹ (All footnotes are appended.)

It is equally true that in none of the statutes by which the United States has waived its sovereign immunity and consented to be sued, is there any provision making the benefits provided in the compensation statutes the exclusive remedy of federal employees. Footnoted is a chronological list of such statutes and their scope.*²

From a review of court decisions, it can be categorically stated that no federal court decision, other than the case of *Posey v. Tenn. Valley Authority*, 93 F. 2d 725 (5 Cir. 1937),*³ has ever held that the FECA affords the exclusive remedy to federal employees. To the contrary, it has been specifically held that the FECA does not bar suits by federal civilian employees against the Panama Railroad,*⁴ or against the United States under the Federal Control Act of 1918,*⁵ under the Suits in Admiralty Act;*⁶ under the Public Vessels Act*⁷ and under the Federal Tort Claims Act.*⁸

Indeed numerous suits by seamen injured on government merchant vessels have been allowed to proceed against the United States and the United States Shipping Board Fleet Corporation without any discussion of the effect of the FECA.*⁹ The Supreme Court itself appears to have taken it for granted that the FECA is not an exclusive remedy. This it has done in several cases, even though what it has said may be characterized as dicta. Yet its reiteration, if it be dicta, is, to say the least, cumulatively persuasive.*¹⁰

It is true that there are three cases in the second Circuit denying naval personnel the right to sue under the Public Vessels Act.*¹¹ But those cases are, at best, merely analogous in that the remedy they hold to be the exclusive remedy available to naval personnel is that provided by the veterans' pension laws and not that accorded by the FECA.*¹² Moreover, the validity of those decisions is now extremely doubtful in view of the Supreme Court's

holding in *Brooks v. United States*, 337 U.S. 49 (1949) that there is nothing in "the veterans' laws which provides for exclusiveness of remedy" so as to bar a suit by a serviceman under the Federal Tort Claims Act.*¹³ The support which the Second Circuit purported to find for these decisions in the Clarification Act of 1943 (57 Stat. 45, 50 USCA App. 1291-1296) is somewhat illusory. The Court stated that the provision of that Act excluding seamen employed through the War Shipping Administration from the benefits of the FECA showed that the Congress did not expect those in its service upon public vessels to enjoy at once the privilege of compensation and the right to sue for damages. Even were the Congressional policy expressed in the Clarification Act accepted as a proper guide to the legislative intent of a previous Congress, the policy behind the special treatment of War Shipping Administration seamen was not that deduced by the Circuit Court. The Committee Reports on the Act*¹⁴ clearly demonstrate that the Congress was motivated by the desire to equate the rights of War Shipping Administration seamen and seamen privately employed, rather than by any feeling that all employees on public vessels should be limited to a single remedy.

It has been argued by the Government that Section 9 of the Public Vessels Act, 46 USC 789*¹⁵ limits libelants to their remedy under the FECA, because a private employer would not be liable to suit inasmuch as the Longshoremen and Harbor Workers' Compensation Act (44 Stat. 1424, 33 USC

901 et seq.) is made the exclusive remedy of employees against private employers. I see no reason for prolonging this opinion by a discussion of this argument. In my opinion the argument is not meritorious.

On October 14, 1949, the Congress added subsection b to Section 7 of the FECA, 5 USC 757, and there provided specifically and clearly that the Act was the exclusive remedy of all employees of the United States except the masters or members of the crew of vessels. (Public Law 357 81st Cong., 1st Sess.). The issue of exclusiveness of remedy therefore is no longer precedentially significant. The 1949 amendments may be said to have some argumentative weight as indicative of Congressional awareness that up to that time the compensation statute was not the exclusive remedy of employees; or, to say the least, that there was grave doubt in the matter.

It is my conclusion that the compensation statute was not the exclusive remedy of the libelants in these cases.

Election of Remedies

There has been almost uniform approval, in the authorities, of the rule that acceptance of compensation under the compensation statute, in the absence of coercion or other improper influence, is a bar to tort suits against the United States for damages. The cases so holding are footnoted.*¹⁶

The evidence in all of the consolidated cases, except that of Gibbs, is clear and convincing that the

libelants applied for and periodically received compensation under the statute. The evidence shows that some, if not all of the six libelants, other than Gibbs, suffered serious burns and injuries in the Antietam explosion. These men were immediately hospitalized and received medical attention. The employees of the Compensation Commission prepared all the necessary papers for the injured men and cooperated in every way to secure the prompt payment to them of their compensation payments. The evidence shows, and it is my conclusion, that all six men were fully aware that they were receiving compensation under the compensation statute. It was suggested and argued by counsel for libelants that some duty rested upon the employees of the Compensation Commission to advise libelants that they might have a right of action against the United States in tort for damages. There is no basis in law or in fair dealing for such a duty. To the contrary, it was the conscientious duty of the employees of the United States, administering the compensation statute, in the circumstances of this case, to see to it that the injured men were assisted in every way to promptly and regularly receive the compensation to which they were entitled. It is my opinion and finding that the libelants uncoercedly received and accepted compensation under the compensation statute. There is not the slightest evidence to sustain the claim that the acceptance of compensation was either not free or was coerced.

It is contended by libelants the making of claims for and acceptance of compensation under the

statute is not sufficient to constitute an election without a final award by the Commission. This argument is invalid. See *Frader v. U.S.* supra., footnote 16.

The cases of all the libelants except Gibbs will therefore be dismissed upon the ground that the libelants are barred from maintaining the actions because they have elected their remedy under the FECA. Findings should be submitted accordingly.

The case of *Gibbs v. United States* poses a somewhat different problem. Gibbs received certain benefits under the FECA, namely, medical and hospital attention. He did not apply for nor did he receive any compensation payments. The court will reserve ruling on the question as to whether or not there has been an election of remedies in his case. His case will be set for further trial on December 19, 1950, for the purpose of hearing further evidence on the issue of election of remedies and also on the merits as to the liability of the United States.

Dated: November 29, 1950.

FOOTNOTES

*¹Act of May 30, 1908, 35 Stat. 556 (covered workmen in manufacturing establishments, arsenals, or navy-yards, or engaged in the construction of rivers and harbor fortifications or in hazardous work under the Isthmian Canal Commission or on reclamation projects);

Act of March 11, 1912, 37 Stat. 74 (extended the 1908 Act to employees engaged in hazardous work under the Bureau of Mines or the Forestry Service);

The Panama Canal Act of August 24, 1912, 37 Stat. 560 (authorized the President to provide compensation for all employees injured while working in connection with the Panama Canal or the Panama Railroad);

The Federal Employees Compensation Act of September 7, 1916, 39 Stat. 742, 5 USC 751 et seq. (the present Act covering the employees of the United States, defined in Section 40 (5 USC 790), as "all civil employees of the United States and of the Panama Railroad Company").

Act of July 15, 1939, 53 Stat. 1042, 5 USC 797 (extended the present Act to members of the Officers' and Enlisted Reserve Corps of the Army injured in line of duty in peacetime, and provided they should elect whether to receive benefits under the Act or pensions based upon military service.)

*²The Shipping Act of September 7, 1916, 39 Stat. 728, 46 USC 801-804 (this Act passed the same day as the Federal Employees Compensation Act, created the United States Shipping Board and subjected every vessel purchased, chartered, or leased from the Board, while employed as a merchant vessel, to all liabilities governing merchant vessels);

The Federal Control Act of March 21, 1918, 40 Stat. 451 (permitted the United States, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating such line might have been sued);

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 USC 741-752 (subjected the United States and its wholly owned corporations to suits in personam in respect to all vessels owned by the United States or such corporations and employed as merchant vessels, also authorized suits to proceed in accordance with the principles of libels in rem, but exempted United States' vessels from seizure by judicial process).

The Public Vessels Act of March 3, 1925, 43 Stat.

112, 46 USC 781-790 (permitted libels in personam to be brought against the United States for damages caused by public vessels of the United States).

The Tennessee Valley Authority Act of May 18, 1933, 48 Stat. 58, 16 USC 831-831dd (created the Tennessee Valley Authority, a corporate body, and granted it the power to sue and be sued).

The Federal Tort Claims Act of August 2, 1946, 60 Stat. 812, 28 USC 1346, 2671-2680 (subjected the United States to suits for damages caused by the negligence of its employees while acting in the scope of their employment).

Other statutes which merely granted certain federal corporations the power to sue and be sued are not included in this listing inasmuch as no pertinent cases concerning them have been found.

^{*3}That case held that the Congress had provided the Federal Employees' Compensation Act as the exclusive remedy against the United States of injured employees of the TVA. The court's decision was based entirely on features of the Tennessee Valley Authority Act, *supra* note 2, which have no analogy in the other statutes here under consideration.

In *O'Neal v. United States*, 11 F. 2d 869 (E. D. N. Y. 1925), the court appears to express the opinion that the Federal Employees Compensation Act is the exclusive remedy of federal employees. However, that case cannot be accepted as a holding to that effect inasmuch as the claimant was a coast guardsman, not entitled to compensation under the Act.

^{*4}*Panama R. Co. v. Minnix*, 282 Fed. 47 (5 Cir. 1922); *Panama R. Co. v. Strobel*, 282 Fed. 52 (5 Cir. 1922). The Panama Railroad was (until 1948) a New York corporation wholly owned by the United States since 1905. Although a suit against the railroad was not technically one against the United States, and recovery from the railroad was indirectly a recovery from the United States.

⁵*Payne v. Cohlmeier*, 275 Fed. 803 (7 Cir. 1921); *Dahn v. McAdoo*, 256 Fed. 549 (N.D. Iowa 1919), reversed on the ground that plaintiff had elected the remedy provided by the Federal Employees Compensation Act by applying for and accepting compensation payments, *Hines v. Dahn*, 267 Fed. 105 (8 Cir. 1920), Circuit Court judgment aff'd sub nom *Dahn v. Davis*, 258 U.S. 421 (1922).

⁶*Marine v. United States*, 65 F. Supp. 111 (Md. 1946), aff'd 155 F. 2d 456 (4 Cir. 1946).

⁷*Mandel v. United States*, 74 F. Supp. 754 (E.D. Pa. 1947); *Smith v. United States*, N.D. Calif., No. 25180, August 13, 1949; *Henz v. United States*, N.D. Calif., No. 25315, January 17, 1950; *Sims v. United States*, N.D. Calif., No. 25434, December 28, 1949.

In at least two cases, seamen injured while employed aboard United States' vessels were permitted to sue under the Public Vessels Act without discussion of the effect of the FECA. *United States v. Loyola*, 161 F. 2d 126 (1947); *Krey v. United States*, 123 F. 2d. 1008 (1941).

⁸*White v. United States*, 77 F. Supp. 316 (N.J. 1948). In *Elgin v. United States*, 89 F. Supp. 195 (W.D. Mo. 1950) the court rendered a judgment in favor of a federal employee against the United States under the Tort Claims Act, without discussion of the FECA.

⁹See, e.g. *Axtell v. United States*, 286 Fed. 165 (E.D. N.Y. 1922); *Unica v. United States*, 287 Fed. 177 (S.D. Ala. 1923); *Morris v. United States*, 3 F. 2d 588 (2 Cir. 1924); *United States Shipping Board Emergency Fleet Corporation v. O'Shea*, 5 F. 2d 123 (App. D.C. 1925); *Zinnel v. USSBEFC*, 10 F. 2d 47 (2 Cir. 1925); *Hansen v. United States*, 12 F. 2d 321 (S.D. Ga. 1926); *Maloney v. United States*, 7 F. Supp. 14 (S.D. N.Y. 1927); *USSBEFC v. Greenwald*, 16 F. 2d 948 (2 Cir. 1927); *Stewart*

v. United States, 25 F. 2d 869 (E.D. La. 1928); Howarth v. USSBEFC, 24 F. 2d 374 (2 Cir. 1928); Ives v. United States, 58 F. 2d 201 (2 Cir. 1932); Stratton v. United States, 8 F. Supp. 429 (S.D. N.Y. 1934); Helmke v. United States, 8 F. Supp. 521 (E.D. La. 1934); Carlson v. United States, 71 F. 2d 117 (5 Cir. 1934); Johnson v. United States, 74 F. 2d 703 (2 Cir. 1935); Smith v. United States, 96 F. 2d 976 (5 Cir. 1938); Desrochers v. United States, 105 F. 2d 919 (2 Cir. 1939).

Employees of the Fleet Corporation were employees of the United States entitled to the benefits of the Federal Employees Compensation Act. Seamen aboard Fleet Corporation vessels were considered to be employees of the United States, even though the vessel was operated by a private agent, if the agency contract was the so-called MO 4 form of agreement. See 34 Ops. Atty Gen. 120 (1924) and 363 (1925). The cases cited above do not always make clear by whom or under what type of agreement the vessel involved was operated. But, the claimants in all of the cases appear to have been treated as employees of the United States; certainly this is true of those cases where the claimant established rights against the United States under the Jones Act, 41 Stat. 1007, 46 USC 688.

^{*10}See Dahn v. Davis, 258 U.S. 421, 428 (1922); Brady v. Roosevelt S.S. Co., 317 U.S. 575, 577 (1943); Brooks v. United States, 337 U.S. 49, 53 (1949).

^{*11}O'Neal v. United States, 11 F. 2d 869 (E.D. N.Y. 1925), aff'd 11 F. 2d 871 (2 Cir. 1926); Haselden v. United States, 24 F. 2d 529, (E.D. N.Y. 1927), aff'd sub nom; Dobson v. United States, 27 F. 2d 807 (2 Cir. 1928); Brady v. United States, 151 F. 2d 742, (2 Cir. 1945) cert. denied 326 U.S. 795 (1946).

^{*12}For an explanation of the apparent incon-

sistency between this statement and the discussion of the Federal Employees Compensation Act in *O'Neal v. United States*, see note 3, *supra*.

*¹³See also *Wootton v. United States* (The Culber-son), 61 F. 2d 195 (3 Cir. 1932) where the mother of a coast guardsman was permitted to sue the United States under the Suits in Admiralty Act, without discussion of the effect of any possible compensation under the veterans' pension laws.

*¹⁴House Report 2572, Senate Reports 1655, 1813, 77th Congress, Second Session; House Report 107, Senate Report 62, 78th Congress, First Session.

*¹⁵"The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

*¹⁶*Dahn v. Davis*, 258 U.S. 421 (1922), affirming *Hines v. Dahn*, 267 Fed. 105 (8 Cir. 1920); *Hillenbrand v. United States*, 1929 A.M.C. 885 (S.D. N.Y. 1929); *Militano v. United States*, 55 F. Supp. 904 (S.D. N.Y. 1943); *aff'd* 156 F. 2d 599 (2 Cir. 1946), cert. dismissed, 329 U.S. 682 (1946); *Parr v. United States*, 78 F. Supp. 693 (Kan. 1948), *aff'd* 172 F. 2d 462 (10 Cir. 1949); *Johnson v. United States*, 89 F. Supp. 65 (E.D. Va. 1949); *Frader v. United States*, 91 F. Supp. 657, 1950 A.M.C. 784 (S.D. N.Y. 1950); *Banks v. United States*, No. 25274, N.D. Calif., May 18, 1950.

See also the dicta in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581 (1943), and *Brooks v. United States*, 337 U.S. 49, 53 (1949). Compare *White v. United States*, 77 F. Supp. 316 (N.J. 1948).

[Endorsed]: Filed November 30, 1950.

[Title of District Court and Cause.]

SUPPLEMENTARY OPINION

Goodman, District Judge.

When the court filed its opinion in this and consolidated cases on November 30, 1950, instead of dismissing this case, as it did the others, on the ground that the acceptance of compensation under the Federal Employees Compensation Act, 5 USC 751 et seq., precluded a suit for damages, the court reserved decision pending further hearing. It did so because libelant Gibbs, unlike the other libelants in the consolidated cases, received no monetary compensation under the FECA, but only medical and hospital attention.

At the subsequent hearing the court received evidence as to the circumstances under which the hospital and medical benefits of the FECA were had by Gibbs as well as evidence upon the general issue of liability of the United States.

The testimony disclosed that Gibbs was a supervisory employee; that not only was he aware and cognizant of the hospital and medical benefits available to civilian employees of the United States under the statute, but that he had also advised other employees under his supervision of these benefits. He received hospitalization and medical attention for his injuries at the United States Marine Hospital. After his discharge from the hospital he received out-patient attention for some time.

Libelant's main contention is that the receipt

and acceptance of hospital and medical attention did not constitute an election of remedies on his part. Only the receipt of monetary compensation, it is asserted, would debar the present suit. This contention I find to be unmeritorious.

The statute itself, 5 USC 790 states that "the term compensation includes the money allowance payable to an employee, or his dependents and any other benefits paid for out of the compensation fund." (Emphasis supplied.)

Federal cases are uniformly to the effect that hospital and medical services constitute compensation within the meaning of 5 USC 790. See U.S. v. Bettis, 39 F.Supp. 160 (S.D. Calif. 1941) and cases therein cited; U.S. v. Steffner (N.D. Calif., #16747 1923) cited in U.S. v. Bettis, *supra* at page 163; U.S. v. Crystal, 39 F.Supp. 220 (N.D. Ohio 1941.)

Thus it is clear that the acceptance of any of the specified statutory benefits would amount to acceptance of compensation and thus constitute an election of remedies.

It has been contended by libelant that the doctrine of election of remedies is not applicable here because libelant is entitled to split the benefits of the statute, i.e. that he may accept certain of the benefits and reject other benefits and still have, as to the benefits rejected, the right to maintain an action such as this against the United States. Neither reason nor authority support such a novel concept. Certainly such extraordinarily favorable

treatment should not be extended in the absence of clear Congressional intent. There is not the slightest evidence that Congress intended to extend such an unusual favor to civilian employees. Libelant has cited certain cases wherein employee actions in damages were permitted against the United States even though hospitalization and maintenance had been received. But these cases are not apropos because they were seamen's cases, And seamen, besides the right to sue for damages, have, under general maritime law, the right to recover maintenance, cure and wages. Such is not true in the case of shoreside civilian employees. The latter have only the rights specifically provided for by the FECA and the Public Vessels Act, 46 USC 781 et seq.

My conclusion therefore is that libelant Gibbs, having knowingly accepted the benefits of the Compensation Act, is debarred from pursuing the instant case under the Public Vessels Act. The case of Gibbs will therefore be dismissed. Counsel should present findings accordingly.

Dated: February 13, 1951.

[Endorsed]: Filed February 16, 1951.

[Title of District Court and Cause.]

LIBELANT'S PROPOSED AMENDMENTS TO
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Comes Now libelant in the above-captioned case and respectfully proposed the following amendments to the proposed findings of fact of the respondent herein heretofore lodged on March 22, 1951, and received by libelant on March 23, 1951:

I.

With reference to paragraph III of respondent's Proposed Findings of Fact that the same shall be amended to read as follows:

"III. That on said November 19, 1946, while libelant was engaged as aforesaid, an explosion occurred aboard said U.S.S. Antietam by reason of the negligence or carelessness of the respondent, United States of America, whereby libelant sustained personal injuries."

II.

That paragraph IV of said respondent's Proposed Findings of Fact shall be amended to read as follows:

"IV. That although respondent failed to produce proof of any substantial sums expended in behalf of the hospital and medical benefits tendered to said libelant, said libelant James C. Gibbs was fully aware and cognizant of the hospital and medical benefits available to him

as a civil service employee of the United States under the Federal Employees' Compensation Act, and that he, with such knowledge, applied for, received and accepted hospitalization and medical attention as a benefit under said Act, for his injuries, at the United States Marine Hospital, San Francisco, California, both before and after institution of this action. After his discharge from the hospital, he was directed to and did receive out-patient attention on a few occasions prior to the institution of this action."

Conclusions of Law

Libelant moves this Honorable Court to amend respondent's Proposed Conclusions of Law as follows:

I.

With reference to paragraph II of said respondent's Proposed Conclusions of Law that the same be amended to read as follows:

"II. That the hospital benefits and medical services are provided under the Federal Employees' Compensation Act."

II.

With reference to paragraph IV of said respondent's Proposed Conclusions of Law that the same be amended to read as follows:

"IV. That libelant, by acceptance of hospital benefits and medical services provided

under said Federal Employees' Compensation Act made an election which bars and estops him from recovery in this action under the Public Vessels Act."

Respectfully submitted,

BELLI, ASHE & PINNEY,

By LOU ASHE,

Proctors for Libelant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause was consolidated with six other cases (Nos. 25263, 25264, 25265, 25287, 25303 and 25344), and came on regularly for trial before the Court on June 19, 1950, the parties appearing by their respective proctors. All parties having consented that said causes could be tried preliminarily upon the issues presented by the Third, Separate and Distinct Defense set forth in the answer of the respondent filed in each said cause, such preliminary trial was had on said day and on each succeeding day thereafter to and including June 22, 1950. Oral and documentary evidence having been introduced by and on behalf of the parties and the matter having been argued and submitted, and the Court being fully

advised, the Court handed down its decision wherein the six other causes above mentioned were dismissed, but a decision in the above-captioned cause was reserved pending further hearing. The Court reserved its decision in this case on the ground that the libelant, James C. Gibbs, unlike the other libelants in the consolidated cases, received no monetary compensation under the Federal Employees' Compensation Act, but only medical and hospital attention.

At the subsequent hearing the Court received evidence as to the circumstances under which the hospital and medical benefits of the Federal Employees' Compensation Act were had by libelant James C. Gibbs, as well as evidence upon the general issue of liability of the United States, and now, being fully advised in the premises, makes the following

Findings of Fact

That on November 19, 1946, and at all times herein material, libelant James C. Gibbs was a civilian employee of respondent United States of America, assigned to and employed in an executive branch of respondent, to wit, the Department of the Navy, as a first class shipfitter, at the San Francisco Naval Shipyards, Hunters Point, San Francisco, California, as a shoreside employee and not a seaman, master, or member of the crew of any vessel, pursuant to Acts of Congress and regulations of the United States Civil Service Commission pertaining to the employment of civilian personnel by the Department of Navy.

II.

That on November 19, 1946, in accordance with orders and assignment as employee of respondent, libelant was engaged as a first class shipfitter in the performance of work and repairs assigned to him as the duty of said employee, upon the Aircraft Carrier of respondent, U.S.S. Antietam, then and there docked at the San Francisco Naval Shipyard, Hunters Point, San Francisco, California.

III.

That on said November 19, 1946, while libelant was engaged as aforesaid, an explosion occurred aboard said U.S.S. Antietam whereby libelant sustained personal injuries.

IV.

That libelant James C. Gibbs was fully aware and cognizant of the hospital and medical benefits available to him as a civil service employee of the United States under the Federal Employees' Compensation Act, and that he, with such knowledge, applied for, received and accepted hospitalization and medical attention as a benefit under said Act, for his injuries, at the United States Marine Hospital, San Francisco, California, both before and after institution of this action. After his discharge from the hospital he received out-patient attention for some time prior to the institution of this action.

Conclusions of Law

I.

That this Court has jurisdiction of the parties and the subject-matter of this suit under the Public Vessels Act, 46 U.S.C. 781, et seq.

II.

That hospital benefits and medical services are provided under the Federal Employees' Compensation Act and are part of the employee's compensation.

III.

That libelant, in accepting hospital benefits and medical services provided under the Federal Employees' Compensation Act, made his election to accept compensation under said Act.

IV.

That libelant, by acceptance of compensation under the Federal Employees' Compensation Act, made an election which bars and estops him from recovery in this action under the Public Vessels Act.

V.

That respondent is entitled to a decree dismissing the libel with costs in respondent's favor.

Let Decree and Judgment be entered accordingly.

Dated: March 28th, 1951.

/s/ LEWIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed March 29, 1951.

In the United States District Court for the
Northern District of California, Southern Division

Adm. No. 25255

JAMES C. GIBBS,

Libellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

The above cause having come on for trial before this Court on June 19, 1950, and on each succeeding day thereafter to and including June 22, 1950, and on January 12 and January 26, 1951, on the issues presented by the pleadings, and the said cause having been tried thereon and submitted to the Court, and the Court having made and filed herein its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the libel filed in the above cause be dismissed, and that Respondent recover its costs in the amount of \$.....

Judgment Rendered This 28 Day of March, 1951.

/s/ LEWIS E. GOODMAN,

United States District Judge.

Lodged March 22, 1951.

[Endorsed]: Filed March 29, 1951.

Entered March 30, 1951.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF DECREE

To Libelant above named, and to Messrs. Belli,
Ashe and Pinney, his proctors:

You Are Hereby Notified that on March 30, 1951,
Decree was entered in the above-entitled suit in
favor of Respondent, United States of America,
and against the libelant above named, as follows:

It Is Ordered, Adjudged and Decreed that the
libel filed in the above cause be dismissed, and
that Respondent recover its costs in the amount
of \$.....

Dated: April 4, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney;

/s/ ANTOINETTE E. MORGAN,
Assistant United States
Attorney.

/s/ HOWARD J. BERGMAN,
Special Assistant to the
United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 4, 1951.

[Title of District Court and Cause.]

PETITION FOR APPEAL

Pursuant Rule 33, Rules in Admiralty, United
States Court of Appeals for the Ninth Circuit

To the Honorable Louis E. Goodman,
District Judge:

Comes now libelant James C. Gibbs, in the above-
entitled action and respectfully shows the court that:

I.

Petitioner is the libelant in the above-entitled
action.

II.

That heretofore on February 16, 1951, this honor-
able court filed its Supplementary Opinion; that
said Opinion was supplementary to that theretofore
filed on November 30, 1950, in this and consolidated
cases.

III.

That on March 30, 1951, judgment and decree
were entered in favor of the respondent United
States and against libelant James C. Gibbs, and
libelant's libel was ordered dismissed; that until
the aforesaid date no final decree of dismissal was
entered; that this petition is made timely and within
the statutory time allowed under 28 USCA, Section
2107, in Admiralty Cases.

IV.

That libelant desires to appeal from the judg-
ment and decree of this honorable court to the

United States Court of Appeals for the Ninth Circuit and is prepared to post bond in the sum of \$250.00 or such other reasonable bond as the Court may direct; that said appeal is not frivolously taken.

V.

That libelant will set forth Assignment of Errors pursuant to Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit.

Wherefore, Petitioner prays order of this Court allowing appeal to the United States Court of Appeals for the Ninth Circuit upon such terms as the Court may direct.

/s/ JAMES C. GIBBS,
Libelant.

BELLI, ASHE & PINNEY.
By /s/ LOU ASHE,
Proctors for Libelant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The verified Petition for Appeal in the above-entitled matter having come before this court on the 14th day of June, 1951, and it appearing to the court that said petition has been made within the statutory time permitted for appeals in Admiralty

under Title 28 USCA, Section 2107, and it further appearing that libelant has filed herein an Assignment of Errors pursuant to Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit, and the court being satisfied that said appeal is not frivolous,

It Is Ordered, Adjudged and Decreed that libelant James C. Gibbs be and he is hereby authorized to prosecute his appeal to the United States Court of Appeals for the Ninth Circuit upon posting with the Clerk of the District Court of the United States security bond in the sum of \$250.00.

/s/ LOUIS E. GOODMAN,

U. S. District Court Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Pursuant Title 28 USCA, Section 2107

To the Clerk of the Above-Entitled Court:

To the United States Attorney for his jurisdiction and to Antoinette E. Morgan, Assistant U. S. Attorney, and Howard J. Bergman, Special Assistant to the United States Attorney:

You and Each of You Will Please Take Notice, that the libelant in the above-entitled action, James

C. Gibbs, does hereby appeal to the Honorable Judges of the United States Court of Appeals for the Ninth Circuit from the Decree and Judgment of the Honorable Louis E. Goodman, filed herein and entered upon the 30th day of March, 1951, and from all of it.

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant,
James C. Gibbs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Pursuant Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit

Comes now libelant, in the above-entitled action, and respectfully urges and asserts the following errors in the findings of fact, conclusions of law, decree and judgment of the Honorable Louis E. Goodman, District Judge.

I.

The Honorable District Court erred in refusing to incorporate libelant's proposed amendments to the findings of fact so as to include a finding that the libelant was injured in the course of his em-

ployment on November 19, 1946, aboard the USS Antietam by reason of the negligence of the respondent, United States of America. The respondent having stipulated that the doctrine of *res ipsa loquitur* was applicable and the Court having so ruled, the failure of the respondent to introduce any evidence in explanation of the explosion which admittedly caused libelant's injury, there could be but one conclusion, to wit, that the injuries sustained by the libelant were proximately caused by the negligence of the respondent.

II.

The Honorable District Court erred in declaring that the mere acceptance of hospital and medical benefits by a shoreside civilian employee of the United States (prior to the 1949 Amendment to the FECA which made the remedy exclusive) was in and of itself an acceptance of "compensation" under the Federal Employees' Compensation Act of 1916.

III.

The Honorable District Court having erred in declaring the acceptance of hospital and medical benefits to be an "acceptance of compensation," erred further in then declaring that the acceptance of such "compensation" (hospital and medical benefits) was, per se, an Election of Remedies—and precluded libelant from pursuing a libel in admiralty under the Public Vessels Liability Act, 46 USCA, 781 et seq.

IV.

The Honorable District Court erred in concluding that hospital benefits and medical services are provided under the Federal Employees' Compensation Act and are part of the employee's compensation.

V.

The Honorable District Court erred in dismissing libelant's libel herein.

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

CITATION

United States of America—ss.

The President of the United States of America
To The United States of America, Respondent, and
to Chauncey Tramutolo, United States Attorney;
Antoinette E. Morgan, Esq., Assistant
United States Attorney, and Howard J. Bergman,
Special Assistant to the United States
Attorney, its Attorneys:

Greeting:

You Are Hereby Cited and Admonished to be
and appear at a United States Court of Ap-

peals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within forty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein James C. Gibbs is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis E. Goodman, United States District Judge for the Northern District of California, Southern Division, this 15th day of June, A.D. 1951.

/s/ LOUIS GOODMAN,
United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, James C. Gibbs, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto United States of

America in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) dollars, to be paid to the said United States of America, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of June in the year of our Lord One Thousand Nine Hundred and Fifty-one.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court, between James C. Gibbs and United States of America, a judgment was rendered against the said Principal and the said Principal having filed in said Court a notice of appeal to reverse the Decree in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said James C. Gibbs shall prosecute said action to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fail to make his plea

good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

[Seal] By /s/ W. G. RISDON,
Attorney-in-Fact.

Attest:

/s/ S. CLIMO,
Agent.

The premium charged for this bond is \$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 15th day of June, A.D. 1951, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. G. Risdon, Attorney-in-Fact, and S. Climo, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent, respectively, of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of

Maryland thereto as principal and their own names as Attorney-in-Fact and Agent, respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] /s/ BELLE JORDAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Nov. 9, 1952.

[Endorsed]: Filed June 16, 1951.

[Title of District Court and Cause.]

SUPPLEMENT TO PETITION FOR APPEAL

Pursuant to Rule 36, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit

Comes Now James C. Gibbs, appellant in the above-entitled matter, and respectfully requests that the appeal in this case heretofore taken on June 14, 1951, be limited to a consideration by the Honorable Court of Appeals of certain specific issues involved in the cause as follows:

I.

When, following his injury upon a public vessel of the United States in navigable waters of the United States, whereon he was in the course of his employment on November 19, 1946, a shoreside

civilian employee of the United States, neither formally or informally applies for nor accepts money compensation, but does consciously accept hospital and medical benefits for a limited period, does the acceptance of such hospital and medical benefits constitute an election to accept compensation under the Federal Employees Compensation Act, prior to the amendments of October, 1949?

II.

Based upon the premises heretofore set forth in paragraph I hereof, does the acceptance of hospital and medical benefits constitute an election to pursue exclusively the rights available to said employee under the Federal Employees Compensation Act (prior to amendments of October, 1949), so as to preclude said employee from prosecuting a libel in admiralty against his employer, the United States, under the Public Vessels Liability Act, 46 U.S.C. 781, et seq.?

III.

Are hospital benefits and medical services provided under the Federal Employees Compensation Act a part of the compensation of a civilian employee of the United States?

IV.

Where it is admitted that an instrumentality wholly and exclusively in control of the respondent has exploded, causing an injury to the libelant, and where it is also stipulated by the respondent that the doctrine of *res ipsa loquitur* is applicable to the facts in evidence, and where the respondent

presents no evidence in explanation of the explosion aboard its vessel nor in rebuttal of the presumption of negligence, was there errancy in the refusal of the trial court to find that libelant's injuries were the proximate result of respondent's negligence?

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant,
James C. Gibbs.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 28, 1951.

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
IN WHICH TO DOCKET APOSTLES ON
APPEAL

It Is Hereby Stipulated by and between counsel
for the libelant and respondent in the above-
entitled action that the time for docketing the
Apostles on Appeal in the within matter may be
extended to and including August 20, 1951.

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant,

James C. Gibbs.

/s/ CHAUNCEY F. TRAMUTOLO,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the

Attorney General.

/s/ HOWARD J. BERGMAN,

Special Assistant to the Attorney General; Proctors

for Respondent, United States of America.

[Endorsed]: Filed July 18, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO DOCKET THE APOSTLES ON APPEAL

Good Cause Appearing Therefor, and upon the filing of the stipulation of the parties hereto of their consent to the extension of time within which to docket the Apostles on Appeal herein, and upon representation to this Court that the Notice of Appeal, Petition for Appeal and Order for Appeal were herein filed on June 14, 1951, and it further appearing that the extension of time requested by the parties will not exceed ninety days from the date of filing of the preliminary documents on appeal, as aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that the time for docketing the Apostles on Appeal in the Court of Appeals of the Ninth Circuit is extended up to and including August 20, 1951, effective for the benefit of all parties concerned.

Dated July 18th, 1951.

/s/ LOUIS E. GOODMAN,

Judge of the District Court.

[Endorsed]: Filed July 18, 1951.

[Title of District Court and Cause.]

SUPPLEMENT TO DESIGNATION
OF APOSTLES ON APPEAL

To the Clerk, United States District Court, for the
Above Jurisdiction:

Comes Now James C. Gibbs, libelant in the
above-entitled matter, and requests that the "Designation of Apostles on Appeal" heretofore filed on
July 25, 1951, shall be supplemented by the following:

1. Transcript of Testimony.

With particular reference to the proceedings in
the above matter held on January 5, 1951, so much
of the record as reflects the colloquy of counsel for
libelant, respondent and the court relative to the
applicability of the doctrine of *res ipsa loquitur* to
the facts of the case; the admission by counsel for
the respondent that the aforesaid doctrine is applicable
to the facts; the statement by the court
that libelant had made out a *prima facie* case and
the court would so hold.

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 31, 1951.

In the Southern Division of the United States
District Court for the Northern District of
California

Nos. 25255, 25263, 25264, 25265, 25287, 25303, 25344
(Consolidated)

Before: Hon. Louis E. Goodman,
Judge.

JAMES C. GIBBS, Libelant, et al.,
Libelants,
vs.

UNITED STATES OF AMERICA,
Respondent.

EXCERPTS FROM TESTIMONY

Appearances:

For the Libelant James C. Gibbs,
Case #25255:

MELVIN M. BELLI, ESQ., by
LOU ASHE, ESQ.

For the Libelant Henry Williams,
Case #25263:

ALBERT H. GOMMO, JR., ESQ., and
G. C. RINGOLE, ESQ.

For the Libelant Michael A. Dimatteo,
Case #25264:

ALBERT H. GOMMO, JR., ESQ., and
G. C. RINGOLE, ESQ.

For the Libelant David Bower,

Case #25265:

ALBERT H. GOMMO, JR., ESQ., and
G. C. RINGOLE, ESQ.

For the Libelant Forest J. Kincade,

Case #25287:

ALBERT H. GOMMO, JR., ESQ.,
FRANK S. BARRETT, ESQ., and
ERIC A. FALCONER, ESQ.

For the Libelant William Comber,

Case #25303:

CHARLES A. CHRISTIN, ESQ., and
WM. T. ECKHOFF, ESQ.

For the Libelant Robert Lee Dentley,

Case #25344:

MESSRS. GLADSTEIN, ANDERSON,
RESNER & SAWYER, by
HERBERT RESNER, ESQ.

For the Government:

FRANK J. HENNESSY,

U. S. Attorney, by

C. ELMER COLLETT,

Asst. U. S. Attorney.

Monday, June 19, 1950, at 10 A.M.

Mr. Collett: Will you take the stand, please?

HILDA LIER

called as a witness on behalf of the Respondent;
sworn.

The Clerk: Will you state your name to the Court, please?

A. Hilda Lier.

Mr. Resner: What is the witness' first name?

The Witness: Hilda.

Direct Examination

By Mr. Collett:

Q. By whom are you employed, Mrs. Lier?

A. The San Francisco Naval Shipyard.

Q. Are you married or single?

A. I am single.

Q. It is Miss Lier, then?

A. Well, I use the word "Mrs."

Q. Yes. And you say you are employed by the United States Naval Shipyard at Hunters Point?

A. Yes, sir.

Q. In what capacity are you presently employed?

A. Compensation and statistical clerk.

Q. And how long have you been employed as compensation and statistical clerk?

A. Since April 1 of 1946.

Q. And were you employed in that capacity in

(Testimony of Hilda Lier.)

the period from [2*] 19 November, 1946, thereafter? A. Yes, sir.

Q. Yes. Now, what is the procedure in accordance with the regulations for filing a claim for compensation?

Mr. Gommo: I object to that, your Honor. I can state the general objection would be outlined by the Act itself. Now, to say that the procedure she uses conforms with the Act is attempting to state a conclusion.

The Court: Well, maybe that is to you. However, why do you object to it? If she followed some procedure that is not in conformity with the law, that would be to your advantage, wouldn't it?

Mr. Gommo: I believe the question assumes a conclusion, your Honor.

The Court: What Mr. Collett is trying to find out, a very simple thing, I think, a man gets injured and since he works for the United States, what do they do about it?

Mr. Gommo: Yes.

The Court: That can't be anything objectionable.

Mr. Gommo: But he said in conformity with the Act, your Honor.

The Court: I didn't hear him say that.

Mr. Gommo: In conformity with the regulations, that is what I am objecting to.

Mr. Collett: Withdraw the question. [3]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Hilda Lier.)

Q. Mrs. Lier, do you recall the occurrence of an accident on or about November 19, 1946, in which several persons, employees of the United States, were injured on the U.S.S. Antietam?

A. Yes, sir, I do.

Q. Did you yourself do anything with regard to the matter of preparing any documents or papers as pertaining to any possible claims they might have for compensation?

A. I prepare all the CA-1's, that is the employee's notice of injury, that is the first document.

Q. I will show you——

Mr. Christin: I would like to have it stricken with reference to compensation, a conclusion. Leave the conversation in, but with reference to any particular thing, that is a conclusion of the witness, going to object to the question. He said the conversation pertaining——

The Court: I don't think—you misunderstood; he didn't ask for any conversation.

Mr. Christin: Pertaining to compensation.

The Court: Pertaining to compensation.

Mr. Christin: That imparts a conclusion, but pertaining to compensation is a conclusion.

The Court: There isn't any jury here and everybody in this courtroom knows we are talking about compensation and we know what the legal issue is in the case. I think it would be wasteful of time to hew the line with respect to [4] conclusions of that nature, Mr. Christin.

Mr. Christin: I am not captious, just want to

(Testimony of Hilda Lier.)

make the statement so that we understand the word compensation, but it may be on this Court to determine what the parties involved mean by compensation, a rather loose word.

The Court: Of course that question, you can meet it when you get to it. I will overrule the objection.

Mr. Collett: I think the question had been answered.

The Court: Yes. I will allow the answer to stand.

Q. (By Mr. Collett): Mrs. Lier, I show you respondent's Exhibit A-1 for identification and document No. 14 is a CA-1 pertaining to one James B. Gibbs. Can you identify that document?

A. Yes, sir.

Q. Is that your signature?

A. That is my signature and I prepared the documents for these people. It was not possible for those people to prepare them themselves, and the work has to be done with dispatch and papers on the way.

Q. Now, what is the CA-1 form?

Mr. Resner: Let the witness answer the question. She hadn't finished yet.

The Court: Did you finish your answer?

The Witness: Well,—

The Court: I think the question was whether you could [5] identify the document.

Mr. Collett: Yes.

The Witness: Yes, I could; I can.

(Testimony of Hilda Lier.)

The Court: Did you prepare it yourself?

The Witness: I prepared this document.

The Court: All right.

Q. (By Mr. Collett): Did you sign that document?

A. Yes, I did sign it by H. Lier for James B. Gibbs. It was intended to be James C., if that is his name.

Q. What is that document CA-1?

A. This is employee's notice of injury or occupational disease. It is the initial paper that serves notice of injury.

Q. Is that necessary that the individual who is injured sign that paper?

Mr. Resner: Now, if your Honor please, that calls for a legal conclusion.

The Court: Yes.

Q. (By Mr. Collett): Is it your——

A. Well,——

Q. Is it your customary practice in regard to the CA-1 form that it is signed by the individual who is injured or may have a——

Mr. Resner: Your Honor, this is all immaterial, nothing to do with the case. The only thing we are concerned with is what happened; she says she signed the form for the injured [6] worker.

The Court: Are you trying to determine what the circumstances were at the time that she signed it, is that it?

Mr. Collett: Well, that particular form, it doesn't make any difference whether signed by the

(Testimony of Hilda Lier.)

individual or not; it is a notice that is required by the statute and by the regulations.

The Court: Why don't you ask—why did you come to make out this form—I would like to know myself—how did you come to make it out?

The Witness: We have authority in the Compensation Act to make it out in lieu of the injured worker when he is not able to do so.

The Court: When this form was made out where was Gibbs; do you know where he was at the time?

The Witness: He likely was in the hospital. This would have been made out within a very short time after the injury occurred, just as soon as the paper work was possible to be done.

The Court: Your office knew that some of these men had been injured in the explosion of the Antietam, is that right?

The Witness: Actually we were all there that day.

The Court: And then you proceeded to get out these necessary—this form?

The Witness: That was the first order in my processing of [7] papers.

The Court: Did you do that in the case of all the men involved in this explosion so far as you know?

The Witness: I believe I made up everything covering all the men at one time. I went through all of the injured people with this paper and then I processed all the papers that were necessary.

(Testimony of Hilda Lier.)

Q. (By Mr. Collett): You say all the papers; you are referring to the CA-1?

A. The CA-1 forms. There were eight badly injured men and there was one death. I processed all eight CA-1's to begin with; that was the initial step. After the first step was recording of the medical record; then this was the second step.

Q. What is CA-2?

A. Official superior's report of injury.

Mr. Resner: I couldn't hear the witness.

The Witness: Official superior's report of injury.

Q. (By Mr. Collett): Is there a CA-2 form, respondent's Exhibit 1-A?

A. Yes, sir; here it is.

Q. And was that form likewise prepared by you? A. Yes, sir.

Q. And you say the official superior's report of injury; do you know what that form is, what purpose it serves? [8]

A. Yes, Mr. Ahern, the safety superintendent, acts in the capacity of an official superior for the shipyard employees, and that is his report to the Bureau of Employees Compensation covering certain data that they require on these cases.

Q. And the CA-3 form, was that prepared by you? A. Yes, sir.

Q. And what form is that?

A. That is giving notice of termination of disability or termination of disability or death. The death notice is done there, too.

(Testimony of Hilda Lier.)

Q. Now, Mrs. Lier, in regard to various cases, the subject of this litigation, that is, Henry Williams, Michael A. Dimatteo, David Bower, Forest J. Kincade, James C. Gibbs, Robert Lee Dentley, and William Comber, was in each instance the CA-1 form prepared by you and signed by you on behalf of each one of these individuals?

A. I believe that I signed them all. I'm—I can very—pretty certain that I made them all up the one day there; I did that one job at one time and I'm pretty certain I signed them all. I would have to check with the jackets to be sure, but it seems I planned my work out in that fashion.

Mr. Collett: That is all I am going to ask this witness at this time.

The Court: Well, I think I better—let me look at this exhibit. You're offering the testimony of this witness [9] now mainly in connection with the offer of respondent's Exhibit A-1 to explain the documents; is that right?

Mr. Collett: Yes, if the Court please. At the same time, if it is possible, to save time I have used the testimony in regard to the forms CA-1 and CA-2 as to all of the various claims. In the Gibbs' case, if the Court please, there was no CA-4 form filed, which is the form claim for compensation.

The Court: They may be marked.

The Clerk: Respondent's Exhibit A-1 introduced and filed in evidence.

(Testimony of Hilda Lier.)

(Whereupon the documents above referred to, marked respondent's Exhibit A-1, were received in evidence.)

The Court: You wish——

Mr. Ashe: I would like to ask the witness a few questions.

Mr. Resner: It does seem they ought to be examined before the documents are admitted, your Honor.

The Court: Perhaps you are right about that; I didn't think there was any particular——

Mr. Resner: This is in the nature of voir dire here, if your Honor please, isn't it? We are trying to determine compliance with the law and what was done, even though Mr. Collett has gone on here to try to establish——

The Court: You are going to put this lady back on the stand? [10]

Mr. Collett: If the Court please, we have a complex problem here. Several different individuals, and a number of documents pertaining to each one. Now, if each one has to be, have to proceed with each one separately, then it will be necessary to call, I expect, Mrs. Lier and Mr. Ahern with regard to each separate group of documents. Now, if that is the way we are going to do it, we will proceed accordingly.

Mr. Resner: I don't think your Honor can tell what she will have to tell in any individual case unless examined on that subject, and while the

(Testimony of Hilda Lier.)

cases are consolidated and certain facts and circumstances are consolidated, each case, I am sure, will have different circumstances.

The Court: Your idea is that counsel for Mr. Gibbs should cross-examine——

Mr. Resner: Except as to that part which may be relevant as to all the libelants.

The Court: Very well.

Mr. Ashe: May I proceed?

Cross-Examination

By Mr. Ashe:

Q. It is Miss Lier?

A. I have been married and acquired the title "Mrs."

Q. Mrs. Lier, with reference to the document before us, Exhibit A, and in reference to page 14 of that exhibit, in writing the name James B. Gibbs at the bottom of the document, entitled "Employee's Notice of Injury or Occupational Disease," [11] can you tell us first who wrote James B. Gibbs at that point? A. That looks like my writing.

Q. Now, on the top of that signed by H. Lier, would you state that that was your writing, Mrs. Lier? A. Yes.

Q. Then when the statement is made witnessed Harold E. Gilbert, can you tell us what was meant by the expression?

A. Mr. Gilbert, a former safety inspector, who works——

(Testimony of Hilda Lier.)

The Court: Would you mind speaking louder? I can't hear you.

A. Mr. Gilbert, one of our former safety inspectors, used to help us and he witnessed my writing on that paper.

Q. (By Mr. Ashe): And there is no question that Mr. Gibbs did not sign this document, is there?

A. No question that he did not sign that document.

Q. Did you sign your name, Mrs. Lier, in the presence of Mr. Gilbert? A. Yes, sir.

Q. Mr. Gilbert is still in the employ of the United States Government?

A. In the shipyard, yes. He is no longer safety inspector.

Q. I assume in filling out some of these other documents which you say you had filled out that you obtained information relative to the situation from whatever departments was necessary to approach for that information; is that right? [12]

A. That's right.

Q. Because none of this was yours, of your own personal knowledge without doing so, is that correct? A. I beg your pardon?

Q. None of the information on here was your personal knowledge until you had inquired relative thereto? A. That's right.

Q. Now, I make reference to the official superior's report of injury and with particular reference to the question on line 32: "Was written notice

(Testimony of Hilda Lier.)

of injury given within 48 hours?" You answered "Yes," did you not? A. Yes.

Q. By that you meant this notice to which we have referred to previously, No. 14, CA-1?

A. Yes, sir.

Q. That is exactly what was meant?

A. Yes.

Q. Had you carefully read the language on the bottom of this one, employee's notice of injury or occupational disease? Would you examine it now, please?

A. (Witness reading paper): Yes, this is the form; that is the way these forms are written up by the Bureau.

Q. No authority given to you, was there, Mrs. Lier, by anyone else on behalf of Mr. Gibbs, acknowledging that he "I hereby make claim for compensation." That was the language [13] there; read it from the printed form.

A. Compensation—I believe that I can——

The Court: What is the question?

Mr. Ashe: The question was, did you receive authority from Mr. Gibbs or anyone on his behalf to assert that he was "hereby making claim for compensation?"

A. We are authorized in the Compensation Act to initiate this form for employees where they are unable to do so themselves.

Q. And over and above that, Mrs. Lier, to my most simple question, no one had authority to commit Mr. Gibbs to that statement on this form?

(Testimony of Hilda Lier.)

A. Well, he was sent down to the Marine Hospital, and I believe sending him there obligated the United States Government medical charges that the Compensation Bureau would have to pay. Therefore, this would have to be submitted in any event.

Q. I see. But so far as this—you see what I am trying to get at; I don't mean to trick you.

A. The man was in no condition—I didn't see the man—no condition to talk to. However, to go to the Marine Hospital, but the fact he was sent to the Marine Hospital the charges were obligated, made it mandatory that we fill out that form.

Q. All right. Now, I invite your attention to this next document, this official superior's report of injury, to line 27, [14] in which it says: "Describe in full how the injury occurred." You wrote in: "Injury during explosion, cause as yet undetermined, aboard USS Antietam"; is that correct?

A. Yes, sir.

Q. Is that because you had not yet had the report of the Board of Inquiry?

Mr. Collett: I object to that, if the Court please; immaterial, irrelevant as to whether the Board of Inquiry——

The Court: Sustain the objection.

Mr. Ashe: All right, I will reframe my question.

Q. Question 33, which states names, and addresses of witnesses to the accident: All statements are secured by a formal Board of Inquiry which is still in session. That was a fact, was it not, on the date you made out this report?

(Testimony of Hilda Lier.)

A. I believe it was. I don't know for sure about that.

Q. With reference to Question 34 of this same document entitled Official Superior's Report of Injury, there is the following question: "Was injury caused by a third party other than a Government employee or agency?" You have put in here the answer "No"; is that correct.

Mr. Collett: If the Court please, the document speaks for itself.

The Court: Yes, the document speaks for itself.

Mr. Ashe: My next question is then, if it does, is from what party did you get the information to write in here the [15] word "No"?

Mr. Collett: I object, if the Court please.

The Court: I don't see the competency of it, Mr. Ashe. What does that have to do with it?

Mr. Ashe: Well, it has this much to do with it, your Honor: We hope to proceed if we have overcome the preliminary objection. I know some place there must be a report that bears the cause of the explosion.

The Court: But the records, the question of the accident itself and the causes of it, all that has nothing to do with these compensation records here.

Mr. Ashe: My questions are not directed——

The Court: They haven't any connection with that matter, have they?

Mr. Ashe: Judge, maybe I have misstated my position. I claimed that we didn't accept compensation.

(Testimony of Hilda Lier.)

The Court: I understand you gentlemen have made that very clear to me; I know they didn't, but all we got before us now is these record matters.

Mr. Ashe: If your Honor feels I shouldn't pursue that, I will withdraw the question.

The Court: I understand that perfectly. You are claiming first of all you didn't accept the compensation; secondly, you are not bound by it, and in the third place that the Government is liable to you, and under the Admiralty Law which Mr. [16] Resner eloquently argued is for damages because of the negligent act on the part of the United States or unseaworthiness of this vessel. I understand that very thoroughly. I don't see how every time there is some little item in these records how that is going to help by arguing it out each time.

Mr. Ashe: In all respect to the Court, I will drop that subject for the time being.

The Court: At least you can drop it on the theory that I understand what you are getting at.

Mr. Ashe: I have no illusions about that.

The Court: Of course, we have the problem here, as I see it, that in the cases under the Compensation Act where a man working for the United States on a vessel and who took a hammer, hit his finger and hurt himself, or got knocked out or fell down, got a concussion and hurt his head, and he wasn't able to take care of himself for several days, that there may be a very wild outcry if somebody working for the United States and whose duty it was to take care of these men didn't see to it that

(Testimony of Hilda Lier.)

the proper initial steps were taken so that they could get compensation.

Mr. Resner: I am prepared to answer that question.

The Court: I don't think that—I am only arguing that to point out that so far as this lady and these officials are concerned they were in all probability doing nothing more than performing their routine duties, without attempting to decide [17] whether or not the United States was liable or was not liable in connection with the matter; that still remains a legal question.

Mr. Resner: If your Honor please, I questioned that and the procedures were in line with what the Bureau had in mind, that is the shipyard people. May I direct your attention to Title 5 of the U.S. Code, Sections 765, 766 and 767. Now, it is true that Section 765 says every employee injured in the performance of his duty or someone on his behalf shall within forty-eight hours after injury give notice thereof to the immediate superior of the employee, and it states how it shall be given. Then 766, the requisites of the notice and, 767, the effect of failure to give—unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown the Commission may allow compensation if the notice is filed within one year after the injury.

Now, it is obvious here everyone had notice, the Departments and the official superiors had notice,

(Testimony of Hilda Lier.)

the point being, your Honor, the way in which the Navy people rushed into this and sought to get compensation for these people was to preclude their asserting a claim for damages. That is our theory.

Mr. Collett: That is his theory.

Mr. Resner: It is something like a shipowner's claim man [18] who goes in and hands a seaman a release, "Here, sign this," gives him a few hundred dollars and that's the end of it. He might have a lot more coming to him.

The Court: Of course, that is provided you are assuming that these employees of the Compensation Department of the United States had some legal knowledge of the fact that they were doing some act here that the law didn't permit.

Mr. Resner: I don't see that, Judge.

The Court: A fraud upon these men, or something of that kind.

Mr. Resner: I don't see that. They, probably like this lady, are following their duties, but it is obvious that the people in charge know and the attorneys know and the Government itself knows the measure of its liability.

The Court: Well, of course, Mr. Collett says the Government has no liability, that is, that the Compensation Act is to take care of these people and there is no liability.

Mr. Resner: He says that, but the Supreme Court doesn't agree with him.

The Court: That is a question of law that you can present, but I don't think that we serve any

(Testimony of Hilda Lier.)

useful purpose in connection with the minor matter of questioning these employees of the Compensation Department about the preparation of these forms to go into that.

Mr. Resner: May I ask the lady several questions? [19]

* * *

Wednesday, June 21, 1950

Mr. Ashe: Call Mr. Gibbs, if your Honor please.

JAMES C. GIBBS

one of the respondents, called as a witness in his own behalf; sworn.

The Clerk: State your name clearly to the Court.

A. James Gibbs.

Direct Examination

By Mr. Ashe:

Q. You have a middle initial, Mr. Gibbs?

A. C.—James C. Gibbs.

Q. You are James C. Gibbs, one of the libelants in these consolidated cases involving an explosion on the United States Ship Antietam?

A. Yes.

Q. And you were upon the date of the explosion, November 19, 1946, in the employ of the United States and aboard that vessel? A. Yes.

Q. And you were injured as a result of the explosion on that vessel? A. Yes.

(Testimony of James C. Gibbs.)

Q. And consequently became a patient at the Marine Hospital in this city; is that correct? [72]

A. Yes.

Q. Will you tell us in your language what injuries you received as a result of that explosion?

A. I had a fractured left heel, cerebral hemorrhage, burns across the back, and miscellaneous bruises, and in the hospital I got a spinal that I still have the effects from.

Q. In other words, you received an injury to your back in the hospital; is that correct?

A. In the hospital.

Q. Now, Mr. Gibbs, I invite your attention first to a document in Government's Exhibit A-1 referred to by the Government as Form CA-1, and invite your attention to what purports to be a signature written in your behalf, and ask you whether or not it is your signature or that of someone other than yourself.

A. It is someone other than myself, not my own.

Q. On November 19, 1946, the date of this instrument, you were in the Marine Hospital; is that correct?

A. Yes.

Q. Were you in pain at that time?

A. Yes.

Q. You weren't submitted any of these documents, similar to the one I just exhibited to you for signature, were you?

A. No.

Q. You knew nothing of this document until I just showed it to you? [73]

A. No.

Q. You have been here for a couple of days. Do you know what the CA-1 form is now?

(Testimony of James C. Gibbs.)

A. Yes, I do.

Q. It has been described as an application for compensation. I ask you categorically, did you ever sign one in your life? A. No.

Q. Did you ever apply for compensation benefits from the Federal Employees' Compensation Act? A. No.

Q. Did you ever receive any compensation or sums of money which allegedly were given to you for the purpose of making payments under the act just described? A. No.

Mr. Collett: We will object to that as calling for a conclusion.

The Court: Strike it out.

Mr. Collett: It goes out?

The Court: Yes, I will sustain the objection to the last question. The answer may go out.

Q. (By Mr. Ashe): Did you at the time of this injury have accumulated sick leave? A. Yes.

Q. Do you of your own knowledge know presently what the amount of that accumulated sick leave was? [74]

A. It was approximately 58 to 60 days.

Q. Of accumulated sick leave? A. Yes.

Q. You had been an employee of the United States Government for how long prior to this accident? A. July 3, 1940.

Q. You worked continually as an employee of the United States in various capacities from that date to the date of your injury?

A. With the exception of about three months between May of '46 and September of '46.

(Testimony of James C. Gibbs.)

Q. Around the date of your accident, what was your assignment——

A. We were told to go into——

Q. I don't mean that. What was the nature of your work? Were you a welder or ship fitter?

A. Ship fitter.

Q. You were earning at that time what?

A. May I correct my statement? I was a ship fitter's helper at that time.

Q. At that time? A. Yes.

Q. Had you ever been characterized as a ship fitter and so named? A. Yes. [75]

Q. Had you worked in the capacity of ship fitter? A. Yes.

Q. Did you receive certain sick leave payments?

The Court: Did you want him to answer the question that you asked him when you got side-tracked, as to what his compensation was?

Mr. Ashe: Thank you, Judge, for helping me out.

Q. What were you making upon the date of the accident? A. \$9.04 a day.

Q. Did you become eligible for a raise in pay at some future date?

A. Immediately upon my being released from the hospital my rate as a ship fitter was approved; it had gone in the day before the accident.

Q. I show you a document in this same government exhibit referred to, A-1, a report of termination of total or partial disability, and ask you whether you have not already reviewed it with me while we were in court? A. Yes.

(Testimony of James C. Gibbs.)

Q. Do you recall my showing you this sheet where, in answer to question 13: "Has employee been paid for any portion of above absence on account of (a) sick leave? (b) sick leave?" It is stated certain days upon which you had received that sick leave pay. Did you receive those amounts?

A. Yes. [75]

Mr. Ashe: Mr. Collett, if you will state what that amount is, according to your records, we will accept that, of course.

Mr. Collett: November 30, 1945, to January 31, 1947, 414 hours, \$610.56. That is on account of sick leave with some three days of holiday pay. And from February 3, 1947, to March 7, 1947, 200 hours, advanced sick leave, \$288.

Q. (By Mr. Ashe): Does that sound correct to you, to the best of your memory?

A. No, I wouldn't say that is quite correct.

Mr. Ashe: You have \$200 of advanced sick leave?

Mr. Collett: That is right.

Q. (By Mr. Ashe): What is your best recollection, Mr. Gibbs?

A. Well, as I understood Mr. Collett, that was—I was given \$600 and some-odd dollars and then an additional \$200.

Mr. Collett: \$288, yes.

The Witness: Well, I will have to accept it, unless I figure it out. It doesn't figure out quite right.

Q. (By Mr. Ashe): When you were separated

(Testimony of James C. Gibbs.)

recently from the service of the United States you were given some accumulated sick leave or annual leave? A. Annual leave, yes.

Q. That was in the amount of two hundred odd dollars? A. Yes. [77]

Mr. Ashe: Could that be the figure to which you refer, Mr. Collett?

Mr. Collett: It could be. This is the amount of advanced sick leave from the records of the Navy; from February 3, 1947, to March 7, 1947, advanced sick leave, \$288, \$200.

Mr. Ashe: As represented by this report of termination which I have in front of me, Mr. Collett?

Mr. Collett: Report of termination.

Mr. Ashe: Here are the dates.

Mr. Collett: That is right.

Mr. Ashe: I don't mean to be argumentative at all.

Mr. Collett: Here is "3/7."

Mr. Ashe: It says "advanced sick leave from December 10 until March 7," isn't that what it says—from January 10th to February 10th——

Mr. Collett: February 10th—there wasn't room enough on that line. This line is "advanced sick leave, and this one, in accordance with the records as this document is made out, February 3rd to March 7th, is shown there. From November 20th to January 31st——

Mr. Ashe: We are agreed that that is the total amount of the sick leave and accrued leave given

(Testimony of James C. Gibbs.)

to this man in connection with this injury, is that correct?

Mr. Collett: That is all the information I have; you will have to agree with me on it. [78]

Mr. Ashe: This is what he got as a result of the injury?

Mr. Collett: This is what the records of the Navy show in accordance with your request, counsel, to compute these days as indicated on your list.

Mr. Ashe: I tried to make myself clear, in connection with this particular injury. I see there are other bits of information here, but with pertinency to this particular issue, he received \$288 and \$610.56, a total of \$898.50, is that right?

Mr. Collett: Mr. Ashe, so that there may be no question, you asked with regard to the respective periods of sick leave and advanced leave, and they are, to the best of my knowledge, as indicated by that document.

Mr. Ashe: I wouldn't hold you to any better knowledge.

Q. By the way, where did those payments come from, Mr. Gibbs?

A. From the San Francisco Naval Shipyard.

Q. Have you ever received any payment from any source other than the San Francisco Naval Shipyard? A. No.

Mr. Collett: Object to that and ask that it be stricken, because he received payments from some place; that is a pretty general statement.

Mr. Ashe: I am sure counsel understands me,

(Testimony of James C. Gibbs.)

and if he wants the record clearer, I will try and be more specific.

The Court. I don't understand what you are getting at. [79]

Mr. Ashe: My point is this: We wish to show to your Honor that we haven't taken any compensation payments at all.

The Court: Why don't you put it in the ordinary language?

Q. This is the only money you got as a result of this accident? A. Yes.

Q. That you didn't work for? A. Yes.

The Court: I will put it that way.

The Witness: Yes.

The Court: Then we all understand it.

Mr. Ashe: If your Honor please, on the basis of the testimony offered and upon the basis of Mr. Collett's, if I may characterize it, opening statement and because all of these men had taken compensation except Mr. Gibbs; upon the basis of the records introduced by the government in which they refer to the payments made to this man as sick leave and advanced sick leave; on the basis of the fact that the government file fails to reflect in any place a so-called CA-4 form, which was required to be signed by employees in order to become entitled to the benefits of the Federal Compensation Act, I now move to strike from the defendant's answer, with particular reference to the second and third separate and distinct defenses of that answer, paragraph III under that [80] heading:

(Testimony of James C. Gibbs.)

“That subsequent to said alleged injury libelant filed a claim with the Bureau of Employees’ Compensation of the Federal Security Agency for disability compensation as a result of said alleged injury; that said libelant was awarded disability compensation and received regular payments in accordance with said award.”

And I further move to strike paragraph IV of the same subsections of the defenses:

“That by virtue of libelant’s claim and acceptance of compensation and in accordance with the provisions of Title 5, USC Section 751, et seq. Libelant has erected his remedy thereunder and is barred from pursuing any other remedy that he might have had.”

The Court: What is the good of moving to strike it? If the government hasn’t sustained that defense, they haven’t sustained it. You do not strike a defense. What does that mean? A man comes in and he pleads in his answer that the action is barred by laches and he doesn’t prove that the action is barred by laches. He has not sustained his defense. I don’t understand what you mean by striking a defense.

Mr. Ashe: Probably in my own humble way it is a way of raising the question.

The Court: If it has not been established, then the defense has not been established, and I will find against him, [81] that is all.

(Testimony of James C. Gibbs.)

Mr. Ashe: I would like to have a stipulation to that effect, if Mr. Collett would be so kind, to save the time of the Court.

The Court: Is this the case that you referred to which raises another legal question different from the other cases, Mr. Collett?

Mr. Collett: If the Court please, I don't know if it raises another question; it is subject to all the defenses. In this case Mr. Gibbs, after his injury, had accumulated sick leave which he was paid, and then he was advanced 200 hours of sick leave which covered to the time that he went back to work, and at that particular point he had received complete pay during the entire period by virtue of the advanced sick leave. He had received his medical care and attention and hospitalization to the point that he was returned back to his former employment. So there was no need to file any compensation claim; he had received everything to which he was entitled under the Compensation Act. Now whether or not that is the equivalent of compensation or a satisfaction of the provisions of the Act, I wouldn't be prepared to say. That is a matter I should think that the Court would have to determine. I certainly wouldn't foreclose the government's point by entering into any stipulation.

The Court: What you are saying there is that whatever [82] relief this applicant was entitled to was under the Act and that he received that.

Mr. Collett: He received it, yes.

The Court: Would you bring out from the wit-

(Testimony of James C. Gibbs.)

ness the factual situation as to when he went back to work so we have a record of when he went back to work, and so forth?

Q. (By Mr. Ashe): Mr. Gibbs, when did you return to work?

A. I can't recall the exact date; it was approximately three months and a half after November 19th.

Q. When you returned to work, what sort of a job did you get?

A. Well, I was given a job where I could sit down at a desk.

Q. As a matter of fact, you returned to work on crutches and in a cast, did you not, sir?

A. Yes.

Q. And were you still continuing as an outpatient at the Marine Hospital in connection with your original injury? A. Yes.

Q. You were unable to carry on——

Mr. Ashe: I will lead for a while, Judge, if I may.

The Court: That is all right.

Q. (By Mr. Ashe): You were unable to carry on those activities which you fulfilled prior to the explosion? A. Yes.

Q. As a matter of fact, you have never returned to the job of ship fitter with all its attendant duties, have you? [83] A. No.

Q. You have occupied jobs which have made it possible for you to work easier and lighter, is that correct? A. Yes, sir.

Q. Are you still working for the Navy?

(Testimony of James C. Gibbs.)

A. No.

Q. When did you separate from the Navy?

A. I believe it was May 28th of this year.

The Court: Of this year?

A. Yes.

The Court: In the jobs that you had—do you mind if I ask this——

Mr. Ashe: Please, Judge, of course.

The Court: In the jobs that you have had since you have been back with the Navy, what did you receive by way of compensation as compared to the compensation you were receiving prior to the accident?

A. The same wages.

Q. (By Mr. Ashe): In other words, lighter work for equal compensation? A. Yes.

The Court: Up to the time that you went back to work on crutches, as you have testified to, up to the time that you went back to work, had you received pay for all of the period that you were in the hospital and incapacitated, [84] by way of sick leave and advanced sick leave?

A. Yes.

Q. Just as if you had been at work?

A. Right.

The Court: All right; I get that.

Mr. Ashe: And I would respectfully show to the Court that Mr. Collett's conception of sick leave as one of the benefits of the Federal Employees' Compensation Act is open to considerable doubt, but I do not wish to argue that legal point at this time.

The Court: You can take that up later.

(Testimony of James C. Gibbs.)

Mr. Ashe: Now Mr. Collett wants to cross-examine.

Cross-Examination

By Mr. Collett:

Q. I thought Mr. Ashe left off a little bit in the air. Getting back to that question I will ask, what were the circumstances surrounding why you went back on crutches?

A. The reason I went back on crutches, I received a letter from the master of our shop informing us—informing me that if I so desired I could come back to work; that duties I could handle would be given to me.

Q. Duties that you could handle would be given to you? A. Yes, sir.

Q. And you felt that that was in accordance with what you wanted to do, did you? [85]

A. I would much rather to be doing something than sitting around in a cast.

The Court: I think you mentioned to me—I may be in error; I think you are the same witness—that you requested the job to get away from the hospital?

Mr. Resner: That was Dimatteo.

Mr. Collett: That was Dimatteo.

The Court: That was the other witness; I am sorry then.

Redirect Examination

By Mr. Ashe:

Q. If Mr. Collett is through, I have one other question, Mr. Gibbs. You are married?

(Testimony of James C. Gibbs.)

A. Yes.

Q. You have a family? A. Yes.

Q. You live now at Redwood City, is that correct? A. Yes.

Q. At the time of this accident you lived in the city and county of San Francisco? A. Yes.

Q. Who is in your family, Mr. Gibbs?

A. Wife and two children.

The Court: Is there anything else you want to ask?

Q. (By Mr. Collett): The offering to you of an opportunity to go back was in the spirit of cooperation and to help you, [86] is that so?

Mr. Ashe: We will object to that. He is characterizing the actions of someone over there. It was more, in the nature, I should say, of a voluntary offer.

The Court: I think the objection is good. Sustained.

Mr. Collett: No further questions.

Mr. Ashe: You may step down, Mr. Gibbs.

Mr. Collett: Thank you very much. [87]

January 5, 1951.

JAMES C. GIBBS

one of the libelants, recalled, upon being duly reminded he was still under oath, testified as follows:

Further Cross-Examination

By Mr. Bergman:

Q. Mr. Gibbs, you testified, I believe, at the former hearing on this matter that you first went to work for the Government in the year 1940, is that correct? A. Yes.

Q. You transferred, I believe, from wherever your position was—I think it was Mare Island—to the San Francisco Naval Shipyards in the year 1946? A. Yes.

Q. Some time during the course of your employment, from the year 1940 until the year 1946, you received certain information with respect to your rights and privileges under the Federal Employees' Compensation Act, did you not? [2*]

Mr. Ashe: "Certain information" sounds rather indefinite, your Honor.

Mr. Bergman: It is not too vague, your Honor, as a preliminary question as to the matter of the libelant's knowledge.

The Court: Overruled.

A. Well, that information, just what type of information are you referring to?

Q. (By Mr. Bergman): Well, you learned, did you not, among other things, that if you were injured in the course of your employment and could

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of James C. Gibbs.)

not work on that account you would be entitled to certain payments of money from the Government?

A. Not to my knowledge. Oh, yes, certain payments a month.

Q. That's right? A. Yes.

Q. You also knew, Mr. Gibbs, that in such an event, that is, injury in the course of your employment, you would receive free of cost to you hospital services by the government, did you not?

A. I never got this information and any literature of anything like that, to my knowledge, but that was general knowledge, yes.

Q. You knew that? A. Yes.

Q. You knew also that in such event you would be given the [3] services of physicians at no expense to you? A. Yes. Yes, that's true.

Q. How did you learn that?

A. Well, through general knowledge. I can't recall receiving any definite literature stating that, but it was generally understood whenever you're hurt they will give you medical care.

Q. At the time you transferred to employment at the San Francisco Naval Shipyards you either were or had been a supervisor in the past, is that not right? A. Yes.

Q. Among others, one of your duties was to impart at least some general information with respect to the privileges of civil service employees to men under you, didn't you? A. Yes.

Q. I will hand you, Mr. Gibbs, an instrument, respondent's exhibit D-1, I believe it is, or I-1,

(Testimony of James C. Gibbs.)

containing the words at the top "Employee's Notice of Injury," and ask you to examine the signature at the bottom. (Handing to witness.) A. Right.

Q. That's your signature, isn't it? A. Yes.

Q. Will you examine the lower left-hand corner of the page, please? A. Right. [4]

Q. That's a CA-1 form, is it not? A. Yes.

Q. Do you recall having testified on your direct examination that you never in your life signed one of those forms?

Mr. Ashe: Now, counsel, let's look at the date of this thing, and you will find it is after the accident by many months. Let's establish the date, please. At the time he testified he hadn't signed that form. Isn't that the fact, Mr. Gibbs?

The Court: I think you'd better let the examination proceed, then.

Q. (By Mr. Bergman): I believe the last question was whether or not the witness recalled testifying never in his life he signed such a form.

A. I don't recall using those exact words. If I did, why, that's true.

Mr. Ashe: If your Honor please, if this is for the purpose of impeachment, the least he could do is exhibit his former testimony to him and lay the foundation.

The Court: Yes, that is a good objection. If he did so testify, he should be shown the testimony or it should be read to him.

Mr. Bergman: I will read, your Honor, from the transcript which I received of the hearing held

(Testimony of James C. Gibbs.)

commencing 19 June. It is on page 73 of this transcript, and is the questioning of the [5] witness by Mr. Ashe and referring to documents in general and particularly CA-1. The questions are these:

“Q. You weren’t submitted any of these documents similar to the one I just exhibited to you for signature, were you? A. No.

“Q. You knew nothing”——

The question before that, I’m sorry. This is by Mr. Ashe:

“Q. Now, Mr. Gibbs, I invite your attention first to a document in Government’s exhibit A-1, referred to by the Government as form CA-1, and invite your attention to what purports to be a signature written in your behalf, and ask you whether or not it is your signature or that is someone other than yourself?

“A. It is someone other than myself, not my own.

“Q. On November 19, 1946, the date of this instrument, you were in the Marine Hospital, isn’t that correct? A. Yes.”

There your Honor will recall the discussion was with reference to a notice of injury of the particular accident involved in this case.

“Q. Were you in pain at that time?

“A. Yes.

“Q. You weren’t submitted any of these documents [6] similar to the one I just exhibited to you for signature, were you?

(Testimony of James C. Gibbs.)

“A. No.

“Q. You knew nothing of this document until I just showed it to you? A. No.

“Q. You have been here for a couple of days. Do you know what the CA-1 form is now? A. Yes, I do.

“Q. It has been described as an application for compensation. I ask you categorically, did you ever sign one in your life?

“A. No.

“Q. Did you ever apply for compensation benefits from the Federal Employees' Compensation Act? A. No.”

That is all I am getting at, your Honor.

Mr. Ashe: Your Honor, I hate to interrupt my brother. There is the document you just showed him. We haven't yet got the date of it, so it will be clear in your Honor's mind the answer to my question at the earlier hearing was proper and true, that up to that time he had not signed an application for compensation or notice of injury.

The Court: That is just arguing the weight of the witness' testimony. You can take him over on further [7] examination.

Mr. Bergman: I don't regard the matter as having substantial bearing on the issues of this case, your Honor. It happens that the notice to which the witness has just testified is dated on its face the 12th of July, 1948. It involves an injury

(Testimony of James C. Gibbs.)

separate and apart from the one involved in this suit.

Mr. Ashe: In which case, I object to it being irrelevant, incompetent, immaterial, inadmissible, having no pertinency to the issues of this case.

The Court: It bears on the knowledge of the witness.

Overruled.

Q. (By Mr. Bergman): What in general, just briefly, was the reason why you signed that notice?

A. Well, it's self-explanatory. I scratched my hand and I went to the dispensary. Now, this is a standard form that they give you before you can receive any type of medical attention. This is given to you whether you go there for a scratch or a serious injury or whatever it is.

The Court: That was about seven months after the Antietam explosion?

Mr. Bergman: No, it's 1948, your Honor.

The Witness: About two years after, I imagine.

The Court: It was about——

The Witness: Two years and a half. [8]

The Court: Two years?

The Witness: Two years and a half.

The Court: A year and a half after the accident. The Antietam explosion was in November, 1946.

The Witness: A year and a half, yes.

Mr. Bergman: November, 1946.

Q. Now, as you say, Mr. Gibbs, this is a form which they give you when you go the the dispensary or the hospital or something like that?

(Testimony of James C. Gibbs.)

A. At the dispensary, yes.

Q. You know it is necessary to make out papers of some kind when you *go the* dispensary or the hospital, then? A. Yes.

Q. You had known that for some years prior to November, 1946, had you not? A. Yes.

Q. You also knew that if you were in such a position where you could not physically make it out someone else would make them out for you?

A. No, I did not.

Q. You knew at the time you were in the Marine Hospital in November, 1946, that you were there at the expense of the Government? A. Yes.

Q. You had no intention of ever paying it yourself? [9]

Mr. Ashe: Objected to as argumentative.

The Court: Well, that objection is good. The objection to the last question is sustained.

Q. (By Mr. Bergman): You knew that papers of some general nature would have to be made out to get you in the hospital?

A. I wasn't concerned about it at the time. I didn't know what the procedure was to get me in there or anything. That was never explained to me.

Q. Why were you not concerned about the papers?

A. Well, at that time I wasn't concerned about much of anything except alleviating my pain. That was my big concern at that time.

Q. You are talking about your then physical condition? A. That's true.

(Testimony of James C. Gibbs.)

Q. When did you learn that when a civil service employee is injured and must go to the dispensary or the hospital he must make out a notice of his injury?

A. That I knew probably from about 1940—about the dispensary. I knew nothing about the hospital. I was never connected in any way with a hospital up to this time.

Q. As a supervisor had you ever had occasion to see that such a notice was made out for another man who was injured?

A. No. All a supervisor does, they have a foreman there that gives a man permission to travel from his work to the dispensary. The time that he leaves is on there; the time that [10] he spends at the dispensary is noted on there; and the time that he returns to work is noted on there. But as far as these forms that you just showed me—I forget the number of it—we are not informed about that at all. And if you care to—I still have a—the course that I took in the supervision over there—and there is no mention of any forms or procedures of injury indicated in that course at all.

Q. But you did know as early as 1940 it was necessary to make out a notice of injury?

The Court: He already said that.

The Witness: Yes.

Q. (By Mr. Bergman): Did you know that it could be made out by someone other than the man himself? A. No.

Q. You did not know that? A. No.

(Testimony of James C. Gibbs.)

Q. Had you known of instances where men were seriously injured and that they were physically incapable, as you were in this case, of making out any forms and immediately were sent to the hospital?

A. No, I never happened to be around anyone that was hurt that seriously.

Q. How many times would you estimate, as well as you can remember, how many times would you say that you had been to a government dispensary in the course of your years of work [11] for the Government?

A. That's kind of hard for me to say with any accuracy, but I remember of two instances prior to 1946.

Q. Did you make out notice of the injury on the occasion, whatever it was?

A. I don't remember what type of form we had to make out for that.

Q. When you were sent to the hospital on the occasion of the injury involved here, Mr. Gibbs, you were conscious then, were you?

A. Yes.

Q. As a result of your injury, do you recall, first, whether or not you were rendered unconscious? Were you rendered unconscious at the time of your injury?

A. I believe so. That is kind of hazy right now. Do you want me to go into that? I will.

Q. I want your estimate of how long you might have been rendered unconscious.

A. I don't know. It might have been five seconds

(Testimony of James C. Gibbs.)

and it might have been five minutes. I really don't know.

Q. But you were at least conscious by the time that you got to the hospital? A. Yes.

Q. And in severe pain?

A. What's that? [12]

Q. And in severe pain? A. Yes.

Q. How long, as well as you can recall, did you stay in the hospital?

A. At the Marine Hospital?

Q. Yes. A. I was there fourteen days.

Q. You knew during the time that you were in the Marine Hospital, of course? A. Yes.

Q. You knew that it was a Government hospital, of course? A. Yes.

Q. You knew also, did you not, that your hospital and medical services were being furnished at the expense of the Government? A. Yes.

The Court: He already said yes to that before. As I understood his testimony, he said he understood that. Isn't that right?

The Witness: Yes.

Mr. Bergman: I'm sorry, your Honor.

Q. During the time you were in the hospital did you ever have a conversation with any of the civil service personnel employees at the Navy Yard with reference to your rights under the Compensation Act? [13] A. No.

Q. Did you ever have a conversation about your rights under the Compensation Act at any time be-

(Testimony of James C. Gibbs.)

tween the time when you were injured and you returned to work?

A. Yes. About, oh, ten or eleven months after the accident I went to the——

Q. Excuse me, Mr. Gibbs. I meant to say——

The Court: He said between the time you went to the hospital and the time that you returned to work after you were in the hospital did you have any conversation with any person—did you say?

Mr. Bergman: With any of the civil service employees at the Navy Yard with respect to your rights under the Compensation law? A. No.

Mr. Ashe: I am quite certain that he doesn't mean to make the question that broad, because a lot of people are civil service employees of the Navy. I think the question should be reframed, if that is the intent of the question. It is those who supervise the Bureau of Employees' Compensation.

The Court: He said he didn't have any conversation with any civil service employees. That should cover it.

Mr. Ashe: I would like the witness to appreciate it. He might have talked to a civil service employee.

The Witness: About compensation, no. [14]

The Court: He said, "About compensation, no."

Mr. Bergman: I thought I said civil service personnel office people at the yard who handled such matters.

A. No, I had no discussion with anyone about compensation while I was in the hospital, up to the time I returned to work.

(Testimony of James C. Gibbs.)

Q. Did you have a conversation with any of the employees at the shipyard there in the personnel office who handled your personnel records and so on with reference to the sick and advance leave that they gave you?

A. Just how that came about, about three weeks after I got hurt a fellow by the name of Mr. Ira Ray came to the house, and they had already arranged to pay me sick leave. Now, I didn't have any conversation with him prior to that time, no.

Q. You had a conversation with whom?

A. Ira Ray.

Q. And then I believe you said they had already arranged, or words to that effect? A. Yes.

Q. Your conversation was with Ira someone?

A. Yes. Ira Ray.

Q. Where was the conversation held?

A. At my home.

Q. As well as you can recall, what did you say to him and what did he say to you about that particular matter?

A. The principal reason he came to the house was to give me [15] a paper approving my rate and then he mentioned that if I wanted to they would carry me on sick leave until I returned to work. That's the way he put it, as near as I can remember. That's been about four years ago.

Q. Did you then have any annual leave to your credit? A. Yes.

Q. Do you recall how much?

A. I really don't recall how much. It couldn't

(Testimony of James C. Gibbs.)

have been very much because I had only been there a short time.

Q. He told you then they would advance you sick leave? A. Not then.

Q. Oh. Were you ever told that they would advance you sick leave?

A. After I had been off about two and a half months they told me that they would, yes.

Q. Do you remember with whom such a conversation might have been held then?

A. I believe that Mr. Barr, the master of Shop 11, and Ira Ray were both involved in that conversation.

Mr. Ashe: Would you be kind enough to spell that last name? I don't think either counsel or I are getting it. A. Ira—I-r-a—Ray—R-a-y.

Q. (By Mr. Bergman): Were you also told at that time that you could take monthly compensation payments instead of advance sick leave? [16]

A. No, not to my knowledge. I don't recall that at all.

Q. Do you know that you could take monthly compensation benefits if you desired?

A. No, I didn't—if I didn't have the sick leave, I could take compensation, yes.

Q. Did you know at that time that if you desired you could take monthly compensation?

Mr. Ashe: I now object, your Honor, on the grounds it is incompetent, irrelevant, immaterial, because as already has been decided by your Honor,

(Testimony of James C. Gibbs.)

he didn't accept compensation benefits and therefore it is irrelevant.

(Argument on the objection.)

The Court: Well, I don't quite see what the materiality of that would be. If there was no acceptance of compensation payments—there isn't any doubt that the witness has testified to that, and I think that he may also have so testified at the other hearing. I am not too clear on that. He did know that he was entitled to get hospital, doctor's services from the Government, and he did receive that. Now the problem that is presented by that testimony is whether or not that constitutes an election of remedies. He couldn't have an election of remedies by virtue of the fact that he didn't take compensation but only by virtue of the fact that he did.

Mr. Bergman: I believe your Honor points out the relevancy of my last question. I can't prove his mental process [17] but I would like to show what he knew.

The Court: He has already testified that he knew that he was entitled to——

Mr. Bergman: Compensation.

The Court: ——compensation, and also to hospital and doctor services, and the evidence is that he did receive doctor services and hospitalization but did not take any compensation. I think that is fair——

Mr. Bergman: That is sufficient——

(Testimony of James C. Gibbs.)

The Court: That is clear. There isn't very much question about that.

I will say that in order—I see there is a little confusion in counsel's mind and perhaps it might be well to clarify that right now. The reason that I said in the opinion that either side could offer further evidence on the subject of remedies was because I did not know whether or not either side might want to offer some kind of evidence of which I was unaware. That is the only reason I put that in. I don't think there is any dispute about the factual aspects of that matter but there might have been some further evidence either side might have wanted to put in and I didn't want to foreclose either side on that. That's why I put that in the opinion. But so far as the record is concerned, I don't think there is any doubt, from what the witness says today and as my recollection is of his testimony before, that he knew that he was [18] entitled to get doctors and hospitalization and also compensation. He did receive hospitalization and doctors' services, but not compensation, except that he got his sick leave.

The Witness: Yes.

The Court: I think that is a fair statement of the record.

Mr. Ashe: Yes, your Honor. I think I practically conceded that when I spoke earlier.

The Court: There still remains the question, legal question, as to whether or not under the circumstances the receipt and acceptance of hospital-

(Testimony of James C. Gibbs.)

ization and doctor services constituted an election of remedies.

Mr. Bergman: Yes, your Honor.

The Court: That is the same as I said before, but I thought it would be best in this particular case, because of the fact that this plaintiff did not receive compensation, to defer the determination of that question until the whole case was heard.

Mr. Ashe: That's right.

Mr. Bergman: That is a matter on which I do wish to be heard and submit authorities to the Court.

The Court: Of course, I think you are pretty much going over—I am not too certain about it because I haven't read the record—you are somewhat going over some of the testimony that was already offered. [19]

Mr. Bergman: I appreciate that. I may have, to some extent, your Honor.

The Court: If there is anything you wish to bring out, go ahead and do it. It has been a long time since we had the other testimony and there may be some matters that weren't brought out.

Q. (By Mr. Bergman): Mr. Gibbs, when you were told that you could be advanced sick leave, had you already commenced suit for damages against the Government? A. No.

Q. Had you determined to do it?

Mr. Ashe: Objected to as incompetent, irrelevant, immaterial, not pertinent to the issues.

(Testimony of James C. Gibbs.)

The Court: What time are you referring to? You said, "Had you already."

Mr. Bergman: The witness testified, I believe, that shortly prior to the time he went back to work, at least some time before he went back to work, he was told that he could be advanced sick leave.

The Court: Is that the time you are referring to?

Mr. Bergman: Yes.

Mr. Ashe: Did your Honor rule against me on that?

The Court: The suit was filed in December of 1947. That is a year afterwards.

Mr. Bergman: The suit was filed much before that, and [20] that's——

Mr. Ashe: As I recall, it was just about—well, just about made the statute of limitations under the Federal Tort Claims Act.

The Court: It was filed under date of February 14, 1947.

Mr. Bergman: The present title was filed September 23, 1946, and I presume the filing date dates back——

Mr. Ashe: I am afraid counsel is confused.

(Further argument on the filing date.)

Mr. Bergman: Perhaps I was confused as to the dates.

The Court: Let's get the date clear. The accident occurred——

Mr. Ashe: November, 1947.

(Testimony of James C. Gibbs.)

The Court: November, 1946. After he left the hospital the witness testified as to the conversation about getting his sick leave.

The Witness: Yes.

The Court: Have you fixed the time of that? Approximately what was the date of that?

Mr. Bergman: As I understand it, he returned to work March 10th.

The Court: That is right.

The Witness: Do you mind if I try to explain a little, your Honor?

The Court: No, no. Let's try to answer our questions. [21]

Mr. Bergman: My memory tells me pretty positively, based on the record, the date of the injury was the 19th of November, and returned to work March 10th.

The Witness: Well, that—I don't recall the exact date, but that's——

The Court: Approximately that time?

The Witness: Yes.

The Court: Now, with respect to the time that you returned to work, when was this conversation about getting the advanced sick leave?

A. That was about a month prior to the time I returned to work.

The Court: All right. Now, at that time, the attorney wants to know, did you then have—had you then determined to file suit against the Government?

A. No.

(Testimony of James C. Gibbs.)

Q. (By Mr. Bergman): Isn't that correct?

Mr. Ashe: To which we object; asked and answered.

The Court: He says, "No."

Q. (By Mr. Bergman): May I direct your attention to respondent's exhibit A-1 and in particular to——

Mr. Ashe: Will you be kind enough to let me see these things?

Mr. Bergman: I am sorry.

Q. ——copy of a letter dated 9 December, 1947, which purports to [22] be from you to the Bureau of Employees' Compensation?

Mr. Ashe: The date of this letter is December 9, 1947?

Mr. Bergman: Yes.

The Court: Is it already in evidence?

The Clerk: Yes, your Honor, Respondent's A-1 in evidence.

Q. (By Mr. Bergman): To refresh your memory, then, if I may read the letter—it is dated December 9, 1947, to the Bureau of Employees' Compensation.

(Reading:)

"Sirs:

"I was hospitalized in the U. S. Marine Hospital, San Francisco, California, and was treated as an out-patient until about November 1, 1947. I was first admitted for treatment on November 19, 1946, after having received

(Testimony of James C. Gibbs.)

fracture of the left heel, burns and bruises in explosion while working at the San Francisco Naval Shipyard, Hunters Point. It will be very much appreciated if you grant U. S. Marine Hospital, San Francisco, permission to supply us with a complete abstract of my diagnosis, treatment and so forth, which information I intend to use for legal purposes.

“Thanking you very much for your courtesy in this matter, I am,

“Very truly yours,

“JAMES C. GIBBS.” [23]

Q. Now I want to ask you, Mr. Gibbs, if you meant by the words “legal purposes” use in connection with this suit? A. Yes.

Mr. Ashe: Counsel will forgive me, but so we will get these things done as we go along, may I respectfully point out, your Honor, that we filed the suit November 14, 1947.

The Court: This letter was written after the suit was filed.

Mr. Bergman: All right.

Q. You intended the papers for use in this suit?

A. Yes.

Mr. Ashe: And, as a matter of fact, they were never granted, counsel.

Mr. Bergman: But you did not see fit to advise the Bureau of Compensation that you were suing them?

Mr. Ashe: Objected to as incompetent, irrelevant and immaterial.

(Testimony of James C. Gibbs.)

The Court: Yes, sustained.

Mr. Ashe: The suit was on file in the District Court and the U. S. Attorney was notified.

Mr. Bergman: Then I shall ask this question:

Q. Why did not you advise the Bureau of Employees' Compensation in that letter that you were going to sue?

Mr. Ashe: Just a minute; objected to as incompetent, irrelevant and immaterial. [24]

The Court: I don't see any competency, that he had already brought suit against the U. S. He wanted to get a look at the records there in the hospital in connection with that suit. What difference does it make whether he advised them? The U. S. had already been sued.

Mr. Bergman: I think before the matter is concluded, as it will be, I think I can point out to your Honor a very substantial materiality.

The Court: What is your point?

Mr. Bergman: In answer to the letter which I just read—perhaps I ought not say—in answer to the letter—on the theory it is my personal conclusion—but the letter I just read was December 9, 1947, to the Bureau of Employees' Compensation. There is a letter to the claimant dated January 12, 1948, which I will just read and state what the respondent states is the conclusion therefrom.

(Reading:)

“Reference is made to your claim because of the injury you sustained on November 19, 1946,

(Testimony of James C. Gibbs.)

while employed by the Navy Shipyard, San Francisco, California.

"It is noted in a report dated October 13, 1947, from the U. S. Marine Hospital in San Francisco, that they desired you to return in three months for re-examination, and if you have not already done so, it is suggested that you return [25] at this time. You may present the inclosed form CA-33 as your authorization.

"In order that further consideration may be given to your request for medical information regarding the above injury, it is requested that you advise this office more fully as to the purposes this information is needed."

The respondent's contention is that the absence indicated on the face of this letter of anything with respect to a suit is particularly singular. And not a thing is mentioned about it.

Mr. Ashe: I still——

Mr. Bergman: I want to follow this up by showing that the libelant reported to the hospital and that——

Mr. Ashe: I will save counsel a lot of time. Whatever is in that record that showed he was there and got treatment, I will say that it's in there, and we don't have to argue about these things. However, I will certainly object to any conclusions on the part of counsel.

Mr. Bergman: I don't wish to be so presumptive. It's not my conclusions. I only offer the instruments for what they are worth.

(Testimony of James C. Gibbs.)

I will next show, if I may, that in response to his first letter, the authorization for treatment——

The Court: You are endeavoring to show that the libelant [26] had treatment at the hospital after he brought the suit against the Government, is that the point?

Mr. Bergman: Yes, sir.

The Court: What is the materiality of that?

Mr. Bergman: It would have exactly the same materiality in the mind of counsel for the respondent in the case of following filing the suit libelant decided to take monthly compensation benefits and did—the fact that the suit was filed doesn't mean what he did with reference to the Compensation Bureau subsequent to that time.

The Court: Was this treatment he got after he filed suit for the injuries that were incurred in the matter in 1946?

Mr. Ashe: Always in connection with the same injury, there is no question about that.

The Court: Why don't you put in evidence or read into the record, whatever you want, on the subject of the nature of the treatment or services that the libelant had at the hospital after he filed the suit? It might have some legal bearing, I don't know—but get it in evidence first.

Mr. Bergman: These two instruments, which I hand counsel, together with a letter of transmittal, are not yet in evidence.

I ask counsel if he has any objection to them being offered?

(Testimony of James C. Gibbs.)

Mr. Ashe: I have no objection to anything that came out of the Marine Hospital. Of course not. It's apparent from [27] this, when they sent the record over during our first trial they meant to include these two documents. No objection.

Mr. Bergman: May they be marked? I offer them.

The Court: Very well.

The Clerk: Respondent's Q, R and S introduced and filed in evidence.

(Letter of transmittal dated December 21, 1950, Federal Security Agency, U. S. Marine Hospital, San Francisco, to U. S. District Court marked Respondent's Exhibit Q. Form CA-33, dated January 12, 1948, marked Respondent's Exhibit R. Form CA-16, dated November 19, 1946, marked Respondent's Exhibit S.)

Q. (By Mr. Bergman): I hand you an instrument, Mr. Gibbs, Respondent's Exhibit R, entitled at the top "Request for treatment of injury under the United States Employees' Compensation Act," and ask you if you recognize that?

The Witness: Yes.

Q. You took that up to the Marine Hospital, did you not, some time in January, 1948?

A. Yes.

Q. You saw a Dr. Bilafer, did you not?

A. I don't recall the doctor's name.

(Testimony of James C. Gibbs.)

Q. You were given some treatment with reference to your foot, were you not?

A. No. [28]

Q. What happened at the hospital, do you remember?

A. Yes. I am sure this is the right one here (indicating). After I wrote that letter you are talking about there for my request of my medical records, they sent me this form here with a letter that I should go out there and be reexamined but not for treatment.

I went out and I saw, I believe it was Dr. Wagner. I can't recall exactly who it was. And they made an appointment for me to see this doctor here. He's a bone specialist, and that was the purpose of that. I am sure that the Bureau that sent this knew by that time I had a suit filed and they were interested in establishing the extent of the injury and they had a specialist there for that examination. I am sure that's all that it was for. But I did not receive any treatment, other than the examination, that's all.

Q. Was it not recommended at that time that special shoes be made for you?

A. No. The doctor at that time read the report of Dr. Wagner and he had already recommended—I forget the medical name for it—a fusion of the joint there to relieve the pain, and he also recommended that that be done if the pain gets too severe.

Some time later—oh, it may have been a year or so later—I was out to see Dr. Wagner and he didn't

(Testimony of James C. Gibbs.)

recommend a [29] special shoe exactly, but he showed me how to put a pad under different sides of the shoe to relieve the pressure, that's all.

Q. It was not a special shoe? A. No.

Q. And a special shoe was not made for you by the government? A. No.

Q. At no time?

A. No. They made me an arch support out of some kind of padding. I don't know exactly.

Q. To refresh your memory I will hand you Respondent's A-1 and direct your attention to what purports to be your letter to the Bureau of Employees' Compensation dated March 20, 1948. You there call attention to the fact, do you not, that you have certain attorneys representing you?

A. Yes.

Mr. Ashe: We will stipulate, your Honor, that we represented him then and we are representing him today.

Mr. Bergman: However, the question and answer is in the record, I presume.

Q. Had you ever at any time prior to the time of that letter called attention to the fact that these counsel were representing you in your suit against the Government?

A. No—other than what is in that other letter; I told them it was to be used for legal purposes.

Q. Legal purposes? [30] A. That's all.

Q. I don't believe this question has been answered. When did you decide to bring this action against the Government?

(Testimony of James C. Gibbs.)

Mr. Ashe: Objected to, your Honor, as being incompetent, irrelevant, immaterial and certainly not pertinent to the issue of the election of remedies, which is before the Court. The facts speak for themselves. The case was filed on a certain day.

The Court: I will overrule the objection.

The Witness: You have tried to find the workings of my mind in this thing. I would like to explain to you exactly how my mind worked in this deal.

The Court: Well, he wants to know—if you can—if you can't answer the question, then you can't answer it. But the question is, when did you decide to file the suit; was that after you consulted the lawyers or before?

The Witness: No. I believe they filed the suit the same day I was up to see him—Mr. Ashe did.

The Court: Was that at or about the time or very shortly prior to the time that you filed the suit? Was that the time you decided to file suit?

The Witness: Yes.

The Court: You filed this suit in November, 1947, about a year after the Antietam explosion?

The Witness: Yes. [31]

The Court: Now, after you filed the suit, did you at any time receive any further treatment, of any kind, at the Government hospital, for the injuries which you sustained in the Antietam explosion?

The Witness: Not to my knowledge, no, sir.

The Court: Well, you would know if you did.

(Testimony of James C. Gibbs.)

The Witness: Other than this, that he brought up here, that's all.

The Court: You say you went there just for an examination at that time?

The Witness: Yes.

The Court: Did you ever receive any treatment of any kind——

The Witness: No.

The Court: Any medical treatment or out-patient treatment of any kind?

The Witness: No.

Q. (By Mr. Bergman): Never received any treatment subsequent to November, 1947?

The Court: That is the date when the suit was filed.

The Witness: No, I don't believe so. That's got me a little bit confused. I will have to go with the record there. I don't know just when I was an out-patient there. A year after I—I'm sure I never returned any more than that time.

Q. (By Mr. Bergman): Don't you remember, Mr. Gibbs, that in [32] June of 1950 you went out to the Marine Hospital and told them you had been laid off at the shipyard; that you tried private work but you couldn't work because of the injury to your foot and you wanted to know if there was anything further they could do for you?

A. No, I did not ask them that.

Q. You were at the hospital in June, 1950?

A. I was sent out there by Mr. Ashe for an examination this case here.

(Testimony of James C. Gibbs.)

Q. Who did you see then?

A. Dr. Wagner.

Q. Did you tell Dr. Wagner that you were being sent out by Mr. Ashe to secure information in connection with this suit? A. Yes.

Mr. Ashe: May I intercede with just this one question. That was in connection with the hearings that we had prior here before Judge Goodman.

Mr. Bergman: Objected to as leading.

The Witness: Yes.

Mr. Bergman: Counsel states that rather than the witness.

Mr. Ashe: Let's not be technical.

The Court: We are moving a little slow. Can't we get through with this evidence?

Mr. Bergman: I hand counsel authenticated copy of a treasurer check of the United States drawn to Dr. R. A. Bilafer, [33] U. S. Government voucher No. 4044 properly authenticated. Offer it in evidence.

Mr. Ashe: You know there are three documents here, do you? You offer all three?

Mr. Bergman: I will offer the entire document.

Mr. Ashe: One refers to the \$20 paid to Dr. Bilafer. There is another in here in another amount. Are you offering that, too?

Mr. Bergman: That would appear to me to be a voucher for bills for expenses in addition to that represented by the check.

Mr. Ashe: Does the name Mr. Gibbs appear anywhere on there? I don't see that it is connected with

(Testimony of James C. Gibbs.)

Mr. Gibbs in any way, do you, on the face of it? I will object to it unless you tie it up to Mr. Gibbs. I don't know anything about this \$192.40.

Mr. Bergman: This exhibit, your Honor, purports to be a photostatic copy. There is a photostatic copy of a treasurer's check drawn to a Dr. Bilafer for \$20. There is a voucher which has a stamp "4044" which states on it "James C. Gibbs, out-patient file" and the amount \$20.00. Attached to that same instrument is a photostatic copy of a voucher No. 4044. Now, I think it is fair to assume that \$20 was charged to the account of Gibbs and that the other amount of \$192.40, to which counsel calls attention, was for some other expense. [34] I can't state that the whole \$192.40 went for the expenses of Gibbs. I don't offer it for that purpose.

The Court: Are these payments made by the Compensation Commission to the Marine Hospital?

Mr. Bergman: To Dr. Bilafer.

The Court: He was a doctor for the Marine Hospital?

Mr. Bergman: Yes, sir.

The Court: Ordinarily the Compensation Commission would not give checks to the Marine Hospital, would it?

Mr. Bergman: No. That is as I stated.

The Court: This is to a private doctor?

Mr. Bergman: That is my understanding.

Mr. Ashe: They sometimes have assistants come in as consultants. That's a perfectly proper charge. I don't have any objection to that.

(Testimony of James C. Gibbs.)

The Court: Then why are you taking time on this to show the value of services?

Mr. Bergman: I don't offer it any more than to show Dr. Bilafer received \$20 fee for having seen the witness.

The Court: On what date, does it say?

Mr. Bergman: There is no date, except on the check itself, which is apparently the 27th of December, 1948. The date of the voucher is December 1, 1948.

Mr. Ashe: May I humbly suggest that counsel make reference to the medical records where it will appear what time Dr. [35] Bilafer saw this gentleman. There will be a reasonable time between that and the payment. I will concede Dr. Bilafer the \$20 for seeing Mr. Gibbs as a consultant, and I have no objection to it going into evidence. The thing I object to again is \$192.40.

Mr. Bergman: Well, there is in evidence this clinical record out-patient card. It has the name Dr. Bilafer. It is dated March 9.

The Court: March 9, what year?

Mr. Bergman: '48.

Mr. Ashe: Counsel, I am not asking you for doctors or anything else. I concede this to you. The \$20 was paid ostensibly because Dr. Bilafer was kind enough to come to the Marine Hospital and see Mr. Gibbs.

The Court: This was after the suit was filed?

Mr. Gergman: Yes. That's all I can show, what's in the record itself.

(Testimony of James C. Gibbs.)

The Court: All right. For that purpose it may be admitted.

The Clerk: Respondent's Exhibit T introduced and filed in evidence.

(The document in the General Accounting Office re Bilafer, M.D., was thereupon received in evidence as Respondent's Exhibit T.)

Mr. Bergman: That's all I have, your [36] Honor.

Mr. Ashe: You will strike from that exhibit then that——

The Court: I am only admitting it for the purpose counsel just stated, for the purpose of showing that Dr. Bilafer was paid \$20 for some services he rendered when called in by the Marine Hospital for the libelant.

Mr. Ashe: But your Honor has not admitted the document for the \$192.40?

The Court: I said for the purposes counsel stated.

Mr. Ashe: Thank you, your Honor.

Mr. Bergman: That's all the questioning I have, your Honor.

The Court: Do you wish to ask any questions?

Mr. Ashe: I have just a few to clear up a few things on this matter. Does your Honor wish me to proceed or is this your Honor's intermission now?

The Court: We will take a five-minute recess.

(Short recess.)

(Testimony of James C. Gibbs.)

Further Redirect Examination

By Mr. Ashe:

Q. Mr. Gibbs, counsel for the Government asked you concerning government notice of injury in connection with notice in your personal file dated 7-12-48 in which you stated you were bumped on the head in the toolroom window, that you cut your hand, and which report you signed, stating that accident had not been brought about by your own misconduct, and so forth. In connection with that particular incident, [37] did you ever apply for or receive compensation benefits? A. No.

Q. Did you ever receive any money from the United States in connection therewith?

A. No.

Q. Did you make any claim for it? A. No.

Q. Did you lose any time from work?

A. What's that?

Q. Did you lose any time from work in connection with it? A. No.

Q. This was then a formality, this filing?

A. Yes.

Q. Counsel also refers to some letters which are in your handwriting, which are conceded yours, in which you ask for an abstract of your medical record at the Marine Hospital, with particular reference to one dated March 20, 1948. You state: "The copy will be turned over to Mr. Lou Ashe. Mr. Ashe is associated with Mr. Melvin Belli, attorney-at-law," citing the address. "Mr. Belli is my attor-

(Testimony of James C. Gibbs.)

ney in a suit that is the result of the injury I received on November 19, 1946."

Did you ever receive this abstract of your medical record? A. No.

Q. To this day have you ever received one?

A. No. [38]

Q. I show you a copy of letter in Respondent's Exhibit A-1 purporting to be signed by Mr. McCauley of the U. S. Department of Justice, and ask you if you received the original of this, Mr. Gibbs?

A. Yes.

Mr. Ashe: If your Honor please, this letter is dated May 21, 1948.

(Reading):

"We have received your letter requesting authorization for the Marine Hospital to furnish your attorney with an abstract of your medical record. However, as this request was made in a claim you have pending against the United States other than that under the Compensation Act, I am transmitting your letter to the Department of Justice. You will probably hear from them regarding the matter within a short time."

Q. Did you ever apply for or receive compensation in connection with any injury sustained in the course of your employment as a civilian employee of the United States prior to November 19, 1946? A. No.

(Testimony of James C. Gibbs.)

Q. And, I take it then, you never received any compensation for any such injury during that period of time? A. No. [39]

Q. When you returned to the Marine Hospital upon any date after November 19, 1947, or at least after the Federal Tort Claims Act was filed, for what reason did you go there and who asked you to go there?

A. Well, I asked for that abstract of my medical record and they wrote me back the letter that you have there requesting me to go back and be re-examined, and then they made this appointment for this doctor—that I can't recall his name there—but they sent him that \$20 check when they called him in to examine me.

Q. When Dr. Bilafer examined you——

A. Dr. Bilafer.

Q. ——did he treat you in any way?

A. No.

Q. Did you receive any medicine? A. No.

Q. Bandages? A. No.

Q. Were you given a cast—— A. No.

Q. And his examination consisted of what, then?

A. Well, I had to walk—he wanted to see the motion of my foot. And he worked the foot to see what degree of movement was in it. That's all.

Q. He asked you questions about how you [40] felt? A. No.

Q. He asked you whether you had pain in the leg, and the like?

A. Yes, he asked about the foot, but that's all.

(Testimony of James C. Gibbs.)

Q. And he made a record of that? A. Yes.

Q. In your presence? A. No.

Q. You recall when I had you on the stand here the first time that I showed you all the various forms in connection with making application for compensation papers for disability, and you then said that you had not filled out any of those forms. You reaffirm that fact now?

A. That's right.

Q. Now tell me, after your experience of some six years in working for the Government, what is sick leave, in your mind?

A. Well, sick leave is a—as I get it—is a bonus that you are given above your wages to use if it is required. In a case of this kind it was required and I used. That I have been told is part of your wages.

The Court: Why ask the witness this question? That is a matter that is established by rule or regulation, isn't it?

Mr. Ashe: We have been, we have all been inquiring into state of mind on direct, your Honor. I thought we might as well bring out his state of mind, his impression of what he [41] was receiving. It might be that is not the legal import. I thought it might have some bearing with your Honor in this case.

The Court: Well, sick leave is something that all government employees get in most departments of the Government.

(Testimony of James C. Gibbs.)

Mr. Ashe: I would think that to be the general rule, your Honor. I think provision is made for them to be hospitalized when they are injured, if they are injured in the course of their employment, and particularly where there is no wilful misconduct involved.

Q. Mr. Gibbs, prior to the time that you brought suit in this case through my office, did you have a discussion with anyone in authority at the San Francisco Naval Shipyard with particular reference to those who administer the Federal Employees' Compensation Act?

A. Yes. I went up to the dispensary—

Mr. Bergman: Your Honor, I wish the witness be instructed to refrain from pursuing further with the answer until he identifies with a little more particularity the one with whom the conversation was had. "One in authority" is too general.

Q. (By Mr. Ashe): First, with whom did you have a conversation, Mr. Gibbs?

A. Mr. Blakiston?

Q. Blakiston? A. Blakiston. [42]

Q. Where was the conversation had?

A. In the yard dispensary.

Q. When was it had?

A. About two days before I came over to see you.

Q. What was the nature of the conversation?

A. Well, I asked him what rights I had as far as disability was concerned in connection to my job.

(Testimony of James C. Gibbs.)

Mr. Bergman: Your Honor, I feel that what the witness might then have said to this person would not amount to advice to him. It amounts to mere self-serving declaration and, further, it is immaterial.

The Court: I don't see the materiality. It is something that took place almost a year after the injury.

Mr. Ashe: Well, counsel has seen fit to go into letters that he wrote two years after the injury. I will withdraw it. Thank you, your Honor.

Q. Now with reference to your sick leave, that is what you used for your support, is it not, when you came out of the hospital, Mr. Gibbs? You are married, of course? A. Yes.

Q. You testified you have two children.

A. Yes.

Q. You are their sole support?

A. Yes. [43]

Mr. Ashe: I think, your Honor, I have no further questions to ask on this particular point, and could I proceed then with the main case?

The Court: Have you anything further that you want to bring out on the question of election of remedies?

Mr. Bergman: No further evidence on the matter, your Honor. I have one question as a result of counsel's redirect questions propounded to the witness.

The Court: You may ask them.

(Testimony of James C. Gibbs.)

Recross-Examination

By Mr. Bergman:

Q. Counsel has just asked you, Mr. Gibbs, with reference to the time that you went to see Mr. Bilafer. A. The doctor?

Q. Do you recall that testimony just a moment ago? A. Yes.

Q. You didn't tell Dr. Bilafer at that time, did you, that you brought suit against the Government?

A. Yes, I did.

Mr. Ashe: Objected to as incompetent, irrelevant and immaterial, and of no consequence here.

The Court: The witness said that he did.

Mr. Bergman: Withdraw it.

The Court: All right.

Mr. Bergman: That is all.

The Court: Is that all? [44]

Mr. Bergman: Yes, your Honor.

The Court: The evidence is closed on this phase of the matter, is it, gentlemen?

Mr. Bergman: Yes, your Honor, as far as the evidence is concerned.

Mr. Ashe: I believe so.

The Court: All right, now the question of liability, do you wish to proceed on that?

Mr. Ashe: Yes, your Honor, I think we should proceed with that.

Mr. Bergman: Would your Honor be at all interested in hearing from the respondent at this

time with respect to its position on the election? I desire to be heard on the matter.

The Court: Well, I think that I would like to get through this case. This is the second hearing on it and I would like to hear all the evidence and then you can make all the argument you want to when it is all in at one time, rather than taking it up piecemeal. It can't be very extensive.

The evidence as to liability, I suppose you will have some medical testimony?

Mr. Ashe: Yes, your Honor. We did subpoena Dr. Wagner, and he came in here during the recess. He had another subpoena and he had to appear in another federal court at 1:30. He will return after two o'clock. We will call Mr. Gibbs on direct examination as to the liability. [45]

JAMES C. GIBBS

recalled to the stand, previously sworn.

Direct Examination

By Mr. Ashe:

Q. You are Mr. James C. Gibbs and you are the libelant in this case, is that true? A. Yes.

Q. And you live where, sir?

A. Redwood City, California.

Q. You have lived there how long?

A. At this time about five years.

Q. So that you were resident there at the time of the filing of the initial suit under the Federal Tort Claims Act, is that true? A. Yes.

Q. At the time of your injury on November 19,

(Testimony of James C. Gibbs.)

1946, you stated you were an employee of the United States Government? A. Yes.

Q. And in what capacity?

A. As a shipfitter helper.

Mr. Ashe: I think your Honor already has the testimony as to the length of time he served with the United States. We need not go into that phase, your Honor?

The Court: All right.

Q. (By Mr. Ashe): When you were transferred from Mare Island in 1946 to San Francisco Naval Shipyard at Hunters Point, [46] what was your rating and capacity at that time?

A. I was called a snapper there. It's a rate just above a first class shipfitter.

Q. And is the duty of a snapper similar to that of a shipfitter?

A. It's more of a supervisory capacity, a leader.

Q. Is that what the Army would call a pusher?

A. Yes.

Q. In other words, you help to get the work out?

A. Yes.

Q. But still working as a shipfitter?

A. Yes. There was an established rate for that.

Q. Now, sir, will you tell me what your pay was when you first came to San Francisco Naval Shipyard?

A. I can't recall exactly what the rate was. It was around—I believe around then it was around \$11. I can't recall the exact rate of pay.

Q. So there won't be any confusion—I asked

(Testimony of James C. Gibbs.)

your rating at the San Francisco Naval Shipyard when you first came there?

A. I was a shipfitter and helper.

Q. Shipfitter helper? A. Yes.

Q. That was a grade lower than shipfitter?

A. Yes, quite a bit below.

Q. Tell the Court how that came about. [47]

The Court: I suppose you are just trying to establish the question of rate of pay, that's all—aren't you?

Mr. Ashe: That and also to show what his duties were and what he had to do and what he could do after the accident.

The Court: Why don't you bring him up to the time of the accident and ask him what he was doing at that time?

Mr. Ashe: All right. I will have to go into something prior to the accident.

The Court: All right.

Q. (By Mr. Ashe): You recall the U.S.S. Antietam, of course? A. Yes.

Q. When did you first go aboard that vessel?

A. About two weeks before November 19.

Q. And upon whose order did you go there?

A. Mr. Artin.

Q. Do you know the gentleman's full name?

A. Arthur Artin, I believe.

Q. You sure it's Arthur?

A. They call him Art.

Q. And he was your immediate superior, was he?

(Testimony of James C. Gibbs.)

A. Yes.

Q. And what orders were given when you went aboard the *Antietam*?

A. Well, at that time they told me to take the lead on this particular job putting in a bomb stowage. [48]

Q. I'm sorry, Mr. Gibbs, I'm missing that entire answer.

A. I was given an assignment to install a bomb stowage.

The Court: Install what?

The Witness: Bomb stowage.

Q. (By Mr. Ashe): Stowage or storage?

A. Stowage. And told to go down and get it ready to install.

Q. You were to do this work alone or in company of others?

A. In the company of others. I was given a lead on the job and I was given men to help me.

The Court: How many men were under you?

The Witness: I wouldn't say anyone was directly under me.

The Court: You said you were given the lead.

The Witness: Yes, and there was a burner, and a chipper, and another shipfitter with me.

Q. (By Mr. Ashe): Now, sir, was that compartment to which you were ordered when you first went aboard the ship the same one in which you were working at the time of the explosion?

A. No.

(Testimony of James C. Gibbs.)

Q. Will you tell us while you were working in this first compartment—am I right in calling it a compartment? A. Yes.

Q. While you were working in the first compartment, will you tell us whether or not anything of significance took place, whether you had any reason to make complaint about the [49] conditions within it?

A. Yes. We were more or less just kind of told to be careful and we have a void adjacent to this compartment. We didn't know what was in there. So I went up and got this ship's plans and we went through several hatchways and took—unbolted a manhole cover and had the tester there to inspect that, and it was—although it was a void, it was found to be explosive and they had to put in ventilation and pump that explosive material out before we could burn and weld in the compartment that we were working in.

Q. Who requested the gas test? A. I did.

Q. To whom did you direct your request?

A. I can't—

The Court: You said a moment ago that you were told to be careful. What did you mean by that?

The Witness: Well, over there it's up to the—at that time anyway, it was up to you to kind of watch out for yourself if you thought—

The Court: No, that isn't what I asked you. You said, "We were told" or "They told us to be careful." Now, whom were you referring to?

(Testimony of James C. Gibbs.)

The Witness: Mr. Artin. They had the knowledge that the ships were dangerous——

The Court: Mr. Gibbs, I just asked you a very simple [50] question as to who made the statement to you to be careful, not what the general circumstances were.

The Witness: Mr. Artin.

The Court: Who?

The Witness: Artin. A-r-t-i-n.

The Court: Who is he?

The Witness: Leaderman shipfitter.

The Court: All right, go ahead.

Mr. Ashe: Thank you, your Honor.

Q. I think I asked you if you made the complaint regarding the gas and you said yes.

A. Yes.

Q. To whom did you make it? Did you answer that question?

A. No, I can't answer that. I don't recall the gentleman's name.

Q. Can you state as to whether or not a gas tester did come into that area?

A. Yes, he did.

Q. Can you state whether you saw him do anything? A. Yes, I saw him make the test.

Q. And what did it consist of?

A. They have a little box that's the testing equipment and they pump air—take air out of the compartment, and if it is explosive it registers on a needle. I don't know the name of the box. [51]

(Testimony of James C. Gibbs.)

Q. Were you standing there when that test was made? A. Yes.

Q. Did you personally observe it?

A. Yes, I did.

Q. Did you note the results of the test?

A. Yes, it was explosive.

Q. What if anything was done after that test was made?

A. In that particular compartment air lines were installed and the air was pumped out, and about two or three days later it was declared safe in that particular area.

Q. Did you continue to work in that area?

A. Yes.

Q. After the gas test?

A. Not until it was O.K.'d.

Q. How long did you work in this first area before you went into the second area?

A. About ten days.

Q. Can you describe this area to the Court so that we can get a picture of it, where it was on board the Antietam? A. Yes, I believe so.

Q. Now talk slowly and see if you can't tell us or describe it for us. Will it help you to use the blackboard?

A. Yes, it would. It's kind of hard to describe a ship's compartment.

Mr. Ashe: Does the Government have any plans or pictures [52] of these compartments?

Mr. Bergman: I have a plan of the ship.

(Testimony of James C. Gibbs.)

Mr. Ashe: Would that be of some help to us and the Court?

The Witness: That would be.

Mr. Bergman: If he can use it. I can get it for you.

Mr. Ashe: I will go on to something else.

The Court: Well, the aircraft carrier is divided into compartments, is that right?

The Witness: Yes.

The Court: You were working in one compartment?

The Witness: Yes.

The Court: Now, what was the general location of this compartment that you worked in for about ten days, where on ship was it located?

The Witness: It was about midships between 150 approximately.

Q. And what was the approximate size of the compartment?

A. Oh, about 20 by 20 feet. It was irregular-shaped compartment.

Q. 20 by what?

A. About 20 by 20. It was an irregular-shaped compartment.

The Court: What had that compartment been used for, if you know? What was it?

The Witness: I don't—it had been used for some type of ammunition storage. [53]

The Court: In other words, it was a storage compartment for some kind of ammunition?

The Witness: Yes.

(Testimony of James C. Gibbs.)

The Court: And did you work in there, on a scaffolding or what?

The Witness: No, we were in there at that particular time to tear out the existing material in preparation to install this new type of stowage.

The Court: What did you stand on, the floor, when you were working there?

The Witness: Both, we stood on the floor and we had scaffolding to reach up.

The Court: So there was some scaffolding?

The Witness: Yes.

The Court: So the job was to clear out this former ammunition storage compartment?

The Witness: Yes.

The Court: And it was located about midship, you say?

The Witness: Yes.

Q. (By Mr. Ashe): You refer to the number as a frame number. If the Court is not aware—perhaps your Honor is better than I. Make that clear.

A. Well, the ship is laid out with frames—I imagine you have seen a little boat or skiff; they have ribs in them. The same thing is relative to a ship. Those ribs are [54] numbered, and this was in the vicinity of frame 50.

Q. Generally amidships? A. Yes.

Q. Prior to the time that you asked for this gas test, did anything else significant happen in the area other than that which you have described in

(Testimony of James C. Gibbs.)

connection with any of the other employees on duty there with you? A. No, nothing in particular.

Q. Did you have occasion at all to remove a manhole cover in that compartment?

A. Not in that compartment. We had finished cleaning this job out and while we were standing there we were told to go into another compartment and remove a manhole cover, three of us, and while we were removing that one of the fellows, as soon as he loosened the manhole cover, the gas started escaping, and that was about two days before this explosion. Well, we went back up and——

The Court: This was in another compartment?

The Witness: Yes. Yes, after the one we were working in.

Q. (By Mr. Ashe): Every once in a while—I regret to say this—your voice gets lost and I don't hear you. A. I am trying to talk up.

Q. Open your mouth and talk slowly, will you, please? Now, where was this area located, where you had occasion to work on this manhole [55] cover?

A. Oh, it was aft and about two decks below where we were working.

Q. What deck were you working on?

A. Five.

Q. This was two decks below it? A. Yes.

Q. Is it proper to say it is called seven?

A. Well, it would be the seventh deck or the skin of the ship, either one.

Q. In the area where you were working, where

(Testimony of James C. Gibbs.)

you removed the manhole cover with some of your other co-workers, are you personally acquainted with the nature of the things which were there? What was there in that area?

A. At that time I wasn't acquainted with it. I have learned since that——

The Court: Don't tell us that.

Q. (By Mr. Ashe): If you say you don't know, that's it.

The Court: After you finished this work in the one compartment then you were sent to work in another compartment; is that what happened?

The Witness: No, this is—we had just gone and released a manhole cover preparatory to a gas test.

The Court: I see. In another area.

The Witness: Yes.

The Court: That was another compartment? [56]

The Witness: Yes.

Q. (By Mr. Ashe): In connection with your work at—we will call it compartment two, the second one—was anybody hurt or injured at that time?

A. No. One of the fellows got pretty sick from the gas coming out of that manhole. That's about all.

Q. Do you remember who that was?

A. Ellis Bohn.

Q. When did you first have occasion to be assigned to the compartment where you were injured?

A. On the day of the explosion.

Q. And that was November 19, 1946, at about what hour?

A. About 8:30 a.m.

(Testimony of James C. Gibbs.)

Q. Was Mr. Artin still your leaderman at that time? A. Yes.

Q. Will you state the fact as to whether he ordered you in there or not?

A. Yes, he did order us in there.

Q. What time do you normally go on duty?

A. Eight o'clock.

Q. Between eight and eight-thirty what happened that morning?

A. We went down and stood by our regular job. We were waiting for material to start that.

Q. What were Mr. Artin's instructions to you, if any he gave?

A. To go into compartment 501M; report to Mr. Lamb that had [57] the lead on that job, and to do as he said.

Q. Is it fair to state in the custom of your work that one day one man has the lead and some other time a man may have it for a particular job?

A. Yes. But generally one man is left on the lead of a job until it is completed.

Q. I see, sir. A. Yes.

The Court: May I interrupt you in sequence here?

Mr. Ashe: Of course, your Honor.

The Court: This is not a compartment—This compartment that you reported to this day, was that the compartment which you referred to wherein the manhole cover was opened?

The Witness: No.

The Court: That is some place else on the ship?

(Testimony of James C. Gibbs.)

A. Yes.

Mr. Ashe: I was about to establish that. Thank you, your Honor, very much.

Q. Now, this compartment to which you reported was located on what deck?

A. The fifth deck.

Q. And it was a place in which you had not worked previously up to this day? A. Yes.

Q. And your first acquaintanceship with it was when you went [58] on the job; is that right?

A. Yes.

Q. Did you observe this compartment when you entered it—yes or no—did you observe the compartment? A. Yes.

Q. Will you be kind enough to describe to the Court its dimensions, height, quality of its outline, and so forth?

A. Well, it's a little—an irregular-shaped compartment, approximately 50 feet wide, 25 feet long. But the irregularity comes from the elevator recess and a trunk recess.

The Court: Was this also an ammunition storage compartment?

A. Yes.

Q. (By Mr. Ashe): Would you be kind enough, Mr. Gibbs, to give us a little freehand sketch—with your Honor's permission—to give us a little freehand sketch of this particular compartment of which you now speak?

(Witness goes to blackboard.)

(Testimony of James C. Gibbs.)

Make it as broad as possible. Then you can put your dimensions in.

A. (Indicating sketch drawn on blackboard): This would be compartment 501-M. This is the elevator, this would be a ladder, and a ladder here.

Q. (By Mr. Ashe): Would you be kind enough to indicate where the starboard and port sides appear? [59]

A. This would be forward, port, starboard, aft (indicating).

Q. How did you enter that compartment?

A. Through a trunk lead—on this ladder.

Q. What do you mean through a trunk?

A. Well, the ladder is encased, is divided off, and they call that a trunk. It is partitioned off, with the ladder going inside. The ladder is along here, like this. I am trying to draw a view of the compartment just as you look at the floor here.

Q. When you went into the compartment were you alone or accompanied by others?

A. I was accompanied by others.

Q. To the best of your present knowledge, state to the Court all the persons, by name, that you recall there with you.

A. Mr. Lamb, Mr. Bohn.

Q. Who else?

A. That's about all the names that I know of the other men that were there.

Q. Can you describe the other men by their occupations on that particular job who were there?

(Testimony of James C. Gibbs.)

A. Yes. There was about two welders, two chippers, three shipfitters, and two fire watchers.

Q. These fire watchers, were those gentlemen, to your knowledge, civilian or naval personnel?

A. They were naval personnel. [60]

Q. And do you have any personal knowledge as to why they were there?

A. Yes. To watch for fire while the welders were welding and the burners were burning and that sort of thing.

Q. The fire watchers who were on duty at the time this explosion finally happened, were those the same men who were on duty when you entered the compartment?

A. No, I believe they changed watchers about—oh, it must have been ten o'clock, or something like that. I don't recall the exact time they changed watches, but they did change while we were there.

Q. Was that somewhat prior to the explosion itself? A. Yes.

Q. Now, Mr. Gibbs, inviting your attention to the floor or deck of this compartment, of what was that made? A. Steel.

Q. What type of steel?

A. They call it malleable steel.

Q. How thick is it?

A. Oh, approximately—either a quarter inch or three-eighths of an inch—I don't recall exactly which.

Q. When you came into the compartment was

(Testimony of James C. Gibbs.)

there anything in language on the walls, on the floor, or anywhere else on the compartment?

A. Approximately in this area, here, there was a line on [61] the deck, like that, and they had written in it "No welding or burning in this area."

Q. Would you be kind enough now to permit me to erase what you have and show where the writing was? A. It was in this area, here.

Q. And it said, "No burning or welding"?

A. "Or chipping."

Q. "Or chipping."

A. Inside this area (indicating).

Q. I think we know what burning is, and welding. What is chipping?

A. Well, chipping is like they have pneumatic air guns to chip off steel. That's to clean up any residue from burning. Principally that's the reason they were in there.

Q. Now, sir, will you give us the dimensions of this area and put them right on the board, the outer area first?

A. This is a wild guess, but I would say about 50.

Q. Feet or inches?

A. About 50 feet by possible 25 feet. Now, that could be very wild. I don't know exactly how wide exactly.

Mr. Ashe: Would counsel for the government be kind enough to bring those plans in this afternoon? Perhaps we could——

(Testimony of James C. Gibbs.)

Mr. Bergman: I am quite sure I have them. If I do, I will. [62]

Mr. Ashe: Thank you sir.

Q. Did Mr. Artin make any comment or did he not make any comment with reference to the inscription on the floor regarding the admonition not to burn, weld or chip?

A. Mr. Artin did not.

Q. Did anyone else call your attention to it in that area?

A. Mr. Lamb pointed the area out to us and told us not to burn and weld inside the chalk lines.

Q. Did he also state why?

A. Yes. It was an unsafe condition, there was gas, and they didn't know exactly where it was coming from aboard the ship and they knew there was some kind of a storage tank directly underneath this deck.

Q. That would be the deck below deck five?

A. Yes.

Q. Now, sir, where did you first go to work in this compartment?

A. Well, we started over here on the port side laying down, you might call it, battens or boards for the lower side of the ammunition—rocket—this was a rocket stowage in this particular area.

Q. How long did you work in your position as described on the port side?

A. Well, from about 8:30 until the time of the explosion I was working between here. We had a blueprint tacked up on [63] this aft bulkhead and

(Testimony of James C. Gibbs.)

we were working from that blueprint to get the location of——

The Court: He asked you how long you were working there.

The Witness: That would be about two hours.

Mr. Ashe: Until the time of the explosion?

A. Yes.

Q. Would you be kind enough just to clarify this, to give us the dimensions of the area which had been marked off with the admonition?

A. That would have to be very approximate, because I could be way off on that, but I would say about, possibly half of the compartment—oh, let's say about 25 by 12, or something like that—15—make it 12 and a half. I'll just guess—Take half of it.

Q. But, at any rate, it was generally in the center of the area? A. Yes.

Q. At any time during the first few hours prior to the accident that you worked over here and occasionally consulting the blueprints tacked up, did anything of significance take place that was extraordinary? A. No, I wouldn't say so.

Q. It is fair to state then that you and the other gentlemen continued with your work without anything happening? A. Yes. [64]

Q. What is your recollection as to the time of this explosion?

A. Well, I thought it was about eleven o'clock

(Testimony of James C. Gibbs.)

in the morning, but I have learned since the correct time.

Q. I make reference to a copy of what purports to be the ship's log—and I first present it to counsel and ask him if that is a copy. That was handed to me by someone in your office.

The Court: What sort of lighting did you have to work by in there?

A. There was electric lights.

The Court: Electric lights?

A. Yes.

The Court: How many men were working in there altogether at the time of the explosion?

A. I would say approximately 10 or 12.

The Court: Were you all working in the same part.

A. In the same compartment. There were some working over here, some working over here, and some working over here.

The Court: All right. What do you want to do, establish the time?

Mr. Ashe: Yes, your Honor.

The Court: Can't you agree on that, what was the time of the explosion?

Mr. Bergman: I am willing to. I can't offhand remember [65] exactly the time.

Mr. Ashe: If I may refer to the log, your Honor——

The Court: The witness says about eleven o'clock.

Mr. Ashe: The log, if your Honor please, says

(Testimony of James O. Gibbs.)

10:27 explosion occurred in coffer dam surrounding gasoline tank C-14, frame 155 port side. Just so much of that, for the moment, to establish the time.

Q. If the log says 10:27 a.m. is the time of the explosion, is that reasonable?

A. Yes. I didn't know the exact time.

Q. One more dimension, Mr. Gibbs. If we were looking up to what the layman calls the ceiling, how many feet would we have from where you were working and the ceiling?

A. I probably have to guess—about eight or nine feet.

Q. Is that a fairly good estimate?

A. I would think so. It could be ten—between eight and ten feet.

Q. At least you could work in comfort there—you didn't have to bend over; the ceiling wasn't on top of you?

A. That's true.

Q. What is the nature of the material of which this upper deck is made?

A. Well, it's constructed of steel beams with the plate laid on top.

Q. At ten o'clock that morning you were still well, were [66] you, and walking around doing your work?

A. Yes.

Q. Assuming the accident to be at 10:27, will you state to the Court precisely what you did the minute or two before that hour?

A. Well, my partner had left to get some safety equipment. I had walked from here, over to this blueprint. I was standing approximately here, and

(Testimony of James C. Gibbs.)

I was getting the location of a different type of batten to put on.

Q. You had changed the nature of the work, then, is that correct?

A. They are all different, different lengths and heights and that sort of thing.

Q. All right. Now speak very slowly and tell the Judge exactly what took place at that time.

A. Well, I left here——

Q. You have told us you were at the blueprint.

A. Oh, yes. I didn't know really what happened. I just felt a heavy wind. That's all I knew. The next thing I knew I was on my hands and knees. I didn't know exactly what had happened. The lights were all out and I looked over here and this was on fire, at this area (indicating).

Q. May I stop you there just for a moment. Just before you felt this wind that you speak of, had you in your hand any explosive materials? [67]

A. No.

Q. Did you have a torch of any kind in your hand? A. No.

Q. Did you handle a torch at any time during this explosion? A. No.

Q. Did you have anything in your hand of what you would call an explosive nature?

A. Not unless it would be a hammer which could make a spark.

Q. There were other men there with hammers, were there? A. Yes.

(Testimony of James C. Gibbs.)

Q. At that moment you were just reading a blueprint? A. Yes.

Mr. Bergman: I object, not particularly to the last question propounded, but to the series of questions which are obviously leading. I have not objected heretofore because I didn't want—I wanted to expedite the matter and hurry it along, but this is one series of questions, one after another, and the only obvious answer to which is "Yes."

The Court: If we let the witness tell the story it would take too long, and it is better that counsel, who is familiar with the case, interrogate him. He had got to the point after he fell down on his knees he turned around and he looked and he saw the area around——

The Witness: This ladder (indicating).

The Court: ——the area around the ladder on the port side [68] in flames.

The Witness: Yes.

Q. (By Mr. Ashe): Was there or was there not a clear vision to that point? A. No.

Q. Why not?

A. Well, it was smoky, and well, quite a bit of smoke.

The Court: You said the lights went out.

The Witness: Yes. There was no light.

Q. (By Mr. Ashe): You could see the flame through the smoke, could you? A. Yes.

Q. Now I want you to stay with me for just a moment. Right after the explosion, this big wind that you felt, what happened to you?

(Testimony of James C. Gibbs.)

A. I don't know. The next thing I know I was trying to get up off the floor.

Q. Did you feel any pain at that time?

A. No.

Q. Did you have any consciousness of having been hurt at that time? A. No.

Q. Were you standing up?

A. No, I was on my hands and knees. I tried to get up and walk. I heard some fellow screaming over here that he was [69] burning up, and I went over to—tried to go and help him.

Q. State the facts as to whether the smoke affected you or did not affect you.

A. Well, it did. I got up and tried to go over here twice and this—then I started—I fell down. I still didn't realize I was hurt, and then I fell down. So then I started to have a hard time getting air, so I left to go out somewhere in here—I don't know where, but anyway I crawled over here and up this hatch, up that ladder.

Q. Do you have any present recollection as to whether the steel deck that you described, which was underneath you, had remained as it was before the accident or whether some change took place?

A. At the time I didn't know. Afterwards they told me.

The Court: Don't say that.

Mr. Ashe: Don't do that, Mr. Gibbs, please.

Q. How did you get to that ladder? Did you walk to it? A. No, I crawled.

Q. How did you crawl?

(Testimony of James C. Gibbs.)

A. On my hands and knees.

Q. When you got to the ladder were you conscious of any pain?

A. No. No, I didn't hurt at all; I just couldn't stand up. But it was hard to breathe, that's all.

Q. Tell us what you did when you got to the ladder. [70]

A. I crawled on my hands and knees up the ladder and on to the deck, and as I started to the galley deck there was a fellow coming down and he asked me if I could make it all right and I told him yes, there was some other guys in there and to go ahead and go after them. So that's where he left me.

Q. How many decks did you have to go up to get to the place where you got air again?

A. Well, that would be about four decks.

Q. And how did you manage that?

A. How did I manage to get up?

Q. How did you get up there?

A. Up this ladder. There is a ladder that runs straight up and down from the fifth deck to the fourth or galley deck—up to it—that would be the second deck the galley is on.

Q. Upon which deck did you finally come out?

A. Well, I came out on the main deck.

Q. I see. What if anything was done at that time for you at that point?

A. Well, they picked me up and took me down to the ship's dispensary.

Q. That was located where?

(Testimony of James C. Gibbs.)

A. Well, let's see. That was down one deck below the main deck and it's on the starboard side of the ship a little bit aft. I imagine that was the outline of the ship.

Q. Did you walk to that place? [71]

A. No, they carried me over there. I couldn't walk.

Q. When did you first realize there was some difficulty about your leg?

A. Well, when I was down here (indicating)—when I fell down I realized that something was wrong with it, but I didn't know what. I didn't know what. I didn't have any idea what was the matter with it. I knew it was hurt.

Q. Have you any present knowledge how long you remained in that compartment after the big wind or explosion?

A. No, I don't know.

Q. The time element is of no significance to you at this time?

A. No.

Q. When you were taken to the ship's dispensary, what if anything was done for you there?

A. Nothing. They brought up fellows that were hurt a lot worse than I and they worked on them for—I just stood by or laid by, rather, until they took me to the yard dispensary.

Q. How did you get to the yard dispensary?

A. Well, I was carried off the ship and put in an ambulance and taken over.

Q. And at that point were they able to help you? Were they sufficiently free to do something for you then?

(Testimony of James C. Gibbs.)

A. No, they were pretty crowded. We had to sit around in the dispensary over there and they—I got sick about that [72] time.

Q. What do you mean, you got sick?

A. Well, I don't know, the shock kind of wore off and I began to hurt. I got sick to my stomach. I felt sick to my stomach. I didn't vomit or anything but one of the fellows came around and gave us a shot of morphine about that time, sedatives.

Q. Tell me, sir, did you strike your head in this accident?

A. Well, I must have. I either struck it or something struck me. They took me from the yard dispensary to the emergency dispensary and that's the first thing they examined me for, was a brain concussion.

Q. Did you have anything on your head which indicated you had been hit in the head?

A. Yes, sir, I had a pretty big bump here (indicating).

Q. Did it pain you at that particular time in the yard dispensary?

A. Well, that is when I first started feeling pain, at the yard dispensary, yes.

Q. Where did you feel this pain?

A. Well, my foot and my head and my back, my fingers were cut and legs were; I was just banged up generally, that's all.

Q. Did you at that time have blood or cuts about your body or your hand?

A. Yes, my shins were skinned and my foot

(Testimony of James C. Gibbs.)

started to turn [73] blue about that time and I knew it was broken then. I was burned across the back.

Q. Any of your hair burned in this explosion?

A. Very little. I took most of the burn across the back. I missed most of the fire.

Q. Thank God for that. How long were you at the yard dispensary?

A. I imagine we were there about an hour.

Q. And you were given morphine, you told us.

A. At the yard dispensary.

Q. Did that help your pain in any way?

A. Yes, it helped. Then the shock wore off and I kept getting, you know—it hurt pretty bad but that morphine helped quite a bit.

Q. All right, sir. Now tell us your progress from the yard dispensary; to what point were you taken from there?

A. We were taken to the emergency hospital on Potrero Avenue in San Francisco.

Q. At the emergency hospital were you attended by any physicians there?

A. There was a physician there. He examined me. He thought I had a brain concussion and then they X-rayed my foot and they couldn't find anything, but then they X-rayed it the second time and they found that I had a broken heel.

A. And that was the first time there had been opportunity [74] for anyone to X-ray your leg, is that right?

A. Yes.

(Testimony of James C. Gibbs.)

Q. Having discovered that, what if anything was done for you at that point?

A. Well, about that time some naval officer came in and had us removed to the Marine Hospital.

Q. In what manner, please?

A. By ambulance.

Q. You at no time had done any walking since you came up the ladder? A. No.

Q. Will you tell me whether the pain continued in any part of your body on the way to the Marine Hospital?

A. Well, that pain was—I couldn't get rid of it for ten or twelve days. It was just there. That's all. I couldn't get away from it.

Q. All right. Now, when you got to the Marine Hospital——

The Court: Why don't you have him take the stand?

Mr. Ashe: I'm sorry.

(Witness returns to stand from blackboard.)

Q. (By Mr. Ashe): When you got to the Marine Hospital I assume that you were placed in a bed and began to receive attention, is that correct?

A. Yes.

Q. Up to that time nobody asked you to sign any papers or [75] do anything about your accident? A. No.

Q. Who was your attending physician, Dr. Wagner? A. Dr. Wagner, yes.

Q. And he continued as your physician all the time that you were in the hospital? A. Yes.

(Testimony of James C. Gibbs.)

Q. With relation to your pain while in the hospital did you make any complaint of it?

A. Yes.

Q. To whom?

A. To the nurses and Dr. Wagner.

Q. What if anything was done for you?

A. They gave me tablets. I believe they said they were codeine.

Q. When, if at all, were you casted at the Marine Hospital?

A. I think it was about three days after I got in there. Approximately.

Q. Did that help to relieve some of the situation? A. No, not at first, it didn't.

Q. At any time while you were in the Marine Hospital were you able to walk on your own power?

A. No.

Q. How long were you there in all?

A. Fourteen days. [76]

Q. What if any discussions were had relative to your staying in the hospital or leaving the same—and with whom, first? First, did you have a discussion with anybody? A. About what?

Q. About staying at the hospital or going home.

A. Well, I believe about the thirteenth day I was able to sit up and I asked to go home, and they told me I wouldn't be able to go home for about three months. But the next day I practically insisted on going home, so they said if I could make it, it would be all right.

Q. This discussion was had with whom?

(Testimony of James C. Gibbs.)

A. Dr. Wagner.

Q. Did you on the fourteenth day become discharged from the Marine Hospital in San Francisco?

A. Yes.

Q. And at that time you left with your cast on?

A. Yes.

Q. And how high a cast did you wear, sir?

A. Well, almost to my hip.

Q. During the time that you were in the hospital will you state the fact as to whether or not your sleep was or was not disturbed.

A. Well, for about ten or eleven days I couldn't do much except all I would do is doze off and I would try—I would wake up trying to get away from that pain in my foot and that [77] was the main trouble.

Q. They were attempting to assist you, were they, in getting rid of that pain?

A. Yes.

Q. In what way?

A. At night time they would give me codeine and that—whatever else there was.

Mr. Ashe: I would state to Your Honor that eventually I shall read the medical records which would indicate that all the time that he was there it was necessary to administer various sedatives such as morphine, nembutal.

The Court: Suppose you just state it. There is no objection, is there?

Mr. Bergman: So long as the record shows.

Mr. Ashe: That there was morphine, nembutal, codeine, and in various grains given to him, mor-

(Testimony of James C. Gibbs.)

phine sulfate, all the same, being sedatives, given for pain, practically up to the very day of his discharge or within a day thereof.

Q. When you left the hospital you left on crutches, I take it? A. Yes.

Q. You went where, to your home?

A. Yes.

Q. Who cared for you there?

A. My wife. [78]

Q. She does not work? A. No.

Q. She took care of you? A. Yes.

Q. When you were discharged you received orders to return for out-patient treatment?

A. Yes.

Q. When were you told to come back?

A. I think I had to go back every week for about two or three weeks. I can't remember that exactly.

The Court: You did go back every week or so?

The Witness: Yes.

Mr. Ashe: And that continued as an out-patient for how long?

A. About six or eight months. I can't recall exactly how long.

Q. Then, I take it, your out-patient treatment continued even after you returned to work?

A. Yes.

Q. Can you tell us when you did return to work?

A. About three months and a half after November 19th.

(Testimony of James C. Gibbs.)

Q. How long were you required to use your crutches?

A. About four months, four months and a half, I guess.

Q. When you disposed of your crutches were you still wearing a cast? [79]

A. No, they had taken off the one up so high (indicating) and put on short cast, just below my knee, and I was told to practice walking on that with the crutches.

Q. Is that what is known as a walking cast?

A. Yes.

Q. Did you continue to wear that cast?

A. For about six weeks, yes.

Q. Speaking of the large cast and the small cast, how many months in all were you casted?

A. Three months and a half.

Q. And you wore crutches for about four and a half months, you say?

A. I would say about that, yes, sir.

Q. Having discarded your crutches were you able to walk without any assistance or did you require some other support?

A. No, I had to use the crutches right after I got the final cast off even, and then I had to have a cane for quite some time after that.

(Whereupon a recess was taken until 2:30 p.m.) [80]

(Testimony of James C. Gibbs.)

January 5, 1951 at 2:30 P.M.

Mr. Ashe: If the Court please, prior to the recess I requested and Mr. Bergman very kindly brought to us a blueprint of the particular compartment which Mr. Gibbs has been describing on the blackboard. I would like permission to send it up to Your Honor presently, but referring to C—501-M, it might help a little as we go along, and may I offer this for identification, with Your Honor's permission.

The Clerk: Libelant's Exhibit 6 marked for identification.

Mr. Bergman: Please read into the record, for my benefit, the identifying marks on the lower right hand corner.

Mr. Ashe: Yes, I would be very happy to. The blueprint is identified as "1st platform." The scale is given $1/16"=1'0"$. It says it is a blueprint of Bureau of Ships No. CV 36.S0103-497100 CV36-Plate 14 of 18.

It has been brought to my attention also, may it please the Court, that the medical records to which I referred have only been put in for identification, and may I now move their admission in evidence.

The Court: Which records?

Mr. Ashe: These, sir, are the medical records from the U. S. Marine Hospital. They are Register No. 109778.

The Court: I mean the clerk's number. The clerk has [81] given them a number.

(Testimony of James C. Gibbs.)

Mr. Ashe: Libelant's 5 for identification.

The Court: Libelant's 5?

The Clerk: Libelant's 5 for identification, yes,
Your Honor.

The Court: All right, mark it in evidence.

(Medical records, U. S. Marine Hosiptal,
Register No. 109778 was received in evidence
as Libelant's Exhibit No. 5.)

Mr. Ashe: If that is similarly true of the X-rays
which came from the hospital, unless those are in
evidence, may I suggest those go in, too, your Honor?

The Court: All right.

The Clerk: Libelant's No. 7 introduced and filed
in evidence.

(X-rays referred to were received in evidence
and marked Libelant's Exhibit No. 7.)

The Court: Which is the compartment?

Mr. Ashe: 501-M.

The Court: Did Mr. Gibbs help you?

The Witness: May I show you? (Demonstrating
on blueprint.)

The Court: I see.

Q. (By Mr. Ashe): Before the recess, Mr.
Gibbs, I believe you told us you had gone home on
crutches and that you thereafter got rid of those
and finally had a cane. How long did you use the
cane, please? [82] A. About three months.

Q. And when you returned to work on crutches,
will you kindly state the nature of the employment
you undertook?

(Testimony of James C. Gibbs.)

A. I was given a job in the shop plan office.

Q. What did your duties consist of, please?

A. Routing of jobs with the blueprints to the men in the shop.

Q. Was that job done in a standing position or a sitting position? A. Sitting.

Q. How long did you continue on that particular job, and in that manner?

A. About a year.

Q. Were you required in connection with this planning job to do any walking, lifting, or any heavy work? A. No.

Q. Was that by arrangement with your superiors? A. Yes.

Q. A year after you occupied the position as a planner, were you given another type of job?

A. Yes.

Q. While you were a planner were you coming to work on your crutches?

A. Part of the time. At the first part, yes.

Q. And in the cast? [83] A. Yes.

Q. And thereafter with a cane? A. Yes.

Q. What was the next job you got after the planning job?

A. They built a new shipfitter shop and I was assigned to move the toolroom, get all the equipment moved to the new shop and set it up in operation.

Q. This second job required you to do what, sir?

A. Well, merely as an acting supervisor to see

(Testimony of James C. Gibbs.)

that the thing was accomplished. I didn't do any work.

Q. And how long did that job continue?

A. That job continued approximately a year. I can't recall exactly the date of it, but it was approximately a year.

Q. Is it fair then to state that for practically two years after you returned to work about March '47 that you had jobs that did not call for you to do much heavy work or walking?

Mr. Bergman: Object to that as the conclusion and statement of counsel rather than of the witness.

The Court: Well, he practically stated that already. I remember you said, though, that your wages were somewhat larger than they were before.

The Witness: No, sir, they were the same.

The Court: Were they exactly the same?

The Witness: Yes.

The Court: Some other witness testified. [84]

Mr. Ashe: Your Honor is right in this regard—just before you got into this explosion did you get a reclassification?

A. Yes.

Q. State to His Honor what happened as a result of the reclassification.

A. Well, the date that I came home from the hospital, this Mr. Ray came out—

The Court: This takes so long. Just state what it is.

Q. (By Mr. Ashe): What is it, that's all.

(Testimony of James C. Gibbs.)

A. I was reclassified to first class shipfitter.

The Court: I think the wages were a little more than you were previously getting, were they not, as a result of that reclassification?

The Witness: Yes.

The Court: During this period that you worked after you returned from the hospital, I think you said that.

Q. (By Mr. Ashe): I take that to be the fact, isn't it? A. Yes.

Q. After you spent two years at these jobs, describe what you did then.

A. I worked between the plan office and the mold loft.

Q. What? A. The mold loft.

Q. What did you have to do in connection with that job? [85]

A. The mold loft is a layout of various ship parts, patterns. Then we send the patterns to the shop to be fabricated from steel.

Q. Did you eventually return to your classification as a shipfitter?

A. Not before I got laid off. After I returned the second time I did, yes.

Q. When were you laid off?

A. About September, I believe, 19th.

The Court: This year?

The Witness: 1949.

Q. (By Mr. Ashe): Did you attempt to seek employment elsewhere after September?

The Court: I thought when this case came up in

(Testimony of James C. Gibbs.)

June of last year you were still working for the Government.

The Witness: No, I was not working.

The Court: You were not. All right.

Q. (By Mr. Ashe): Had you attempted to seek employment after September, 1949? A. Yes.

Q. In what field?

A. I tried to go carpentering.

Q. Are you a member of the carpenters' union?

A. Yes.

Q. Do you hold a card in that union? [86]

A. Yes, sir.

Q. Did you get a job as a carpenter?

A. Yes, sir.

Q. What did you earn as a carpenter?

A. That was seventeen-eighty and nineteen dollars a day.

Q. What do you mean by that?

A. Well, we were paid on a daily rate, by the day.

Q. I don't know what seventeen eighty and nineteen dollars means.

A. When I first went carpentering the scale was \$17.80 a day. After I was there a while it was raised to nineteen.

Q. Did you hold that job down for any length of time?

A. Approximately three or four months.

Q. Were you fired or were you laid off or did you quit or what happened?

A. No, I got a call back to the Navy Yard and

(Testimony of James C. Gibbs.)

I was having quite a bit of trouble holding the job. I couldn't do roof work and that. So I went back to the Navy Yard.

Q. As a carpenter in that particular classification what were you required to do physically to discharge your duties?

A. Well, we were required to fabricate parts of buildings and put on roofs and general carpenter work.

Q. Did it require you to use anything like ladders? A. Yes.

Q. Did you have to climb? [87] A. Yes.

Q. Up and downstairs, and so forth?

A. Yes.

Q. Were you able to do so?

A. No, not too well. That's the reason I came back to the yard.

Q. When did you return to the yard?

The Court: Why? What happened? What was the matter with your foot that made it tough for you?

The Witness: Your Honor, I am not sure on it, and when I get up high I am not sure of my foot and I——

The Court: Does it give you pain?

The Witness: Yes.

Q. (By Mr. Ashe): What if anything in connection with the foot was it that made work difficult for you?

A. Well, I am not sure of it. When I stand on

(Testimony of James C. Gibbs.)

it, particularly when I try to climb, I am not sure I am going to stay up.

Q. When did you return to the yard, sir?

A. That was about last June.

Q. 1950? A. Yes.

Q. Have you continued at the yard since that time? A. Yes.

The Court: You said "yard." Navy yard? [88]

Mr. Ashe: San Francisco Naval Shipyard. I should have been clear, Your Honor.

The Court: That's all right.

Q. (By Mr. Ashe): And you are still there at this time? A. Yes.

Q. And in what capacity presently?

A. Shipfitter.

Q. As a shipfitter what are you doing?

A. At the present I am working inside Shop 11.

Q. In connection with your work is there much walking to do presently? A. Yes.

Q. How are you getting along now?

A. Pretty well. I have quite a bit of pain with the thing in the afternoons. I have to go and sit down once in a while, but it gives me trouble particularly in the afternoons after I am on it all morning.

Q. When do you notice it the most?

A. Well, after I do a lot of walking.

Q. You have been back to the hospital on various occasions as described by my colleague here?

A. Yes.

(Testimony of James C. Gibbs.)

Q. For examinations in connection with your basic injury? A. Yes.

Q. But never in connection with any other injuries since [89] this accident? A. No.

Q. You haven't hurt that foot in any way since this accident? A. No, other than——

Q. I mean, you have no second injury——

A. No.

Q. ——to it? A. No.

Q. Were you acquainted at the time you were at the San Francisco Naval Shipyard, and with particular reference to the Antietam, with what the schedule was for the work to be done on that vessel? Just answer yes or no first. A. Yes.

The Court: What did you mean by schedule of work?

Mr. Ashe: So much work has to be done in so many days on a particular project, as I understand it.

The Court: What is the materiality of that?

Mr. Ashe: I have a point, Your Honor.

The Court: Speak up. Say what it is.

Mr. Ashe: I will tell you what it is. I make an offer of proof that Mr. Artin and others told him this was a rush job, it was a hot job, and hurry up and get it done.

The Court: What would be the materiality of that?

Mr. Ashe: My purpose is to show proper safeguards and [90] precautions were not taken, and I think——

(Testimony of James C. Gibbs.)

The Court: That wouldn't necessarily follow. That is a rather hackneyed sort of a claim in cases, that it is a hurry-up job. There is no connection between the fact it is a hurry-up job and whether precautions are taken. Precautions should have been taken whether or not it is a hurry-up job or a slow job. I don't see the connection there. That kind of argument goes before juries sometimes.

Mr. Ashe: I assure you, I don't mean to impose upon Your Honor, and I don't intend to do it.

The Court: It is immaterial. If the Government had a duty here and did not perform it and they were negligent, it doesn't make any difference whether it is a hurry-up job or not.

Mr. Ashe: I see Your Honor's point and I thank you, sir.

Q. Now in connection with your previous injury, will you please state to the Court all the things that presently bother you which you claim are the result of this injury, in detail, please.

A. The foot is very sore. It is right now. I haven't been free of pain from the thing from the time it happened.

The Court: Is the pain in the heel itself?

The Witness: Yes. It is in the foot, Your Honor, and these joints are partially fused together (indicating).

The Court: Where did the bone break?

The Witness: Across here, the heelbone. [91]

The Court: Right across the heelbone?

The Witness: Yes. And the doctor tells me that

(Testimony of James C. Gibbs.)

has affected the cords that are attached to the heel-bone, and the joints—as a result of healing has deposited calcium in the joints, and that is where I get the pain. So he tells me.

The Court: And you still have pain?

The Witness: Yes.

The Court: Does it hurt you continually or can you walk for a reasonable period of time and then feel pain?

The Witness: It hurts—I am conscious of it all the time, but the more I walk the more severe it gets.

Q. (By Mr. Ashe): Would you be kind enough, if His Honor has not noticed it previously, to walk back and forth in this area, please?

The Court: I have observed the plaintiff.

Mr. Ashe: Very well, Your Honor.

Q. The amount of money you would have gotten as a carpenter, I take it, is greater than that which you are presently earning? A. Yes.

Q. By how many dollars a day?

A. I would say about \$4—let's see—it would be three dollars and a half a day.

Q. Following this accident, and at the Marine Hospital, [92] would you state whether or not anyone representing the U. S. Navy came to see you?

A. Please repeat that.

Q. Would you state whether or not anyone in the uniform of the U. S. Navy came to see you at the hospital? A. Yes, they did.

Q. Do you know who it was presently by name?

(Testimony of James C. Gibbs.)

A. No.

Q. Who did they say they were, if such statement was made?

A. They said they were investigating the accident aboard the Antietam.

Q. And they questioned you there about it, did they?

A. Yes.

Q. And you answered those questions?

A. Yes.

Q. With further regard to your present complaints, do you think that your sleep is disturbed at all at the present time or can you sleep reasonably well?

A. Not sometimes for several hours after I go to bed until this thing quits throbbing and aching.

Q. Would you state whether the weather has or has not any effect on the injured part?

A. Yes, I believe it does.

Q. What effect does it have, if any?

A. Well, I believe in cold weather it affects me by [93] stiffening it up and making it more difficult to walk. It seems to ache more in cold weather.

Q. Have you made any statements to persons other than these naval officers to whom I just referred?

A. No, not about the accident, no.

Q. Do you have any recollection as to whether when the explosion or the great wind occurred, when you were at position here (indicating), before the blueprint, whether you were thrown any dis-

(Testimony of James C. Gibbs.)

tance, or did you find yourself, if you know, within that same area? A. I don't know.

Q. Have you told us everything you know presently about what happened in that compartment?

The Court: Well, that's a fairly big order. If you have forgotten, you can always come back to it.

Q. (By Mr. Ashe): I did ask your age presently, did I? A. 36.

Mr. Ashe: I trust that Your Honor will be willing to take judicial notice of the 1941 mortality table, and may I state to Your Honor——

The Court: You mean as to life expectancy?

Mr. Ashe: Yes, Your Honor.

The Court: Well, I suppose it might have some materiality. Usually it has not except in cases where there is a rather complete disability. It is hard to apply it in the case where [94] there is——

Mr. Ashe: I will assure you that the medical evidence in this case will show that he has a very serious disability which he is going to have the rest of his life.

The Court: Well, it can't do any harm to take judicial notice. What is the life expectancy?

Mr. Ashe: According to this table he has a life expectancy of 32.59 years.

You may cross-examine.

The Court: Mr. Ashe, are you going to have a doctor in this matter?

Mr. Ashe: I should explain that to Your Honor. He is in another court.

(Testimony of James C. Gibbs.)

The Court: How about the Government; are you going to have any medical testimony?

Mr. Bergman: The only medical testimony which will be used by the Government is that of Dr. Wagner, whom I understand libellant is going to call.

The Court: You will have the doctor here?

Mr. Ashe: I have subpoenaed him, Your Honor.

Cross-Examination

By Mr. Bergman:

Q. Mr. Gibbs, Dr. Wagner, your physician at the Marine Hospital, he was your doctor there substantially all of the time?

A. Yes, he was in charge of the proceedings, yes. [95]

Q. Are you now working for the Navy Department at the Yard, is that it? A. Yes.

Q. As I understood you, your rate of pay now is \$4 over what it was at the time of the accident, is that correct, approximately?

A. I would say approximately, yes.

Q. Is it true that you had been working for the Navy Shipyard here at San Francisco since the accident with the exception of some three months?

A. No.

Q. You worked as a carpenter for three months.

A. I have been laid off twice since the accident.

Q. Oh.

A. The exact length of time in between the lay-offs, I do not remember exactly.

(Testimony of James C. Gibbs.)

Q. Those were the result of reduction in force, were they not? A. Yes.

Q. Is it not true that on a number of occasions since the accident, approximately three or four times, you have received notices of separation from your work because of reduction in force and those notices have from time to time been extended?

A. No. I received two reduction in force notices and I was laid off both times. [96]

Q. How long have you been working at the job you have there at the Yard now?

A. I came back, I believe it was June, 1950, the last time.

Q. Then you haven't lost any wages thus far as a result of your injury, is that correct?

A. No, not at the Navy Yard.

Mr. Bergman: Nothing further.

(Witness excused, with reservation to recall, to permit Dr. Wagner to take the stand.)

* * *

[Endorsed]: Filed July 5, 1951. [96A]

[Title of District Court and Cause.]

REPORTER'S SUPPLEMENTAL TRAN-
SCRIPT RELATING TO APPLICABILITY
OF THE DOCTRINE OF RES IPSA LO-
QUITUR AND FAVORABLE HOLDING
BY THE COURT

2 P.M. January 5, 1951

(Dr. Wagner excused.)

* * *

Mr. Ashe: The next point which concerns me, unless there is an objection at this time, is the question, of course, of the applicability of the doctrine of res ipsa loquitur.

(Argument in support of the applicability.)

The Court: Does the Government dispute that the doctrine of res ipsa loquitur applies here?

Mr. Bergman: The Government is willing, if your Honor feels he has enough evidence to consider that point, to submit it now for determination.

* * *

The Court: I think you have enough to satisfy the general principles.

* * *

Mr. Bergman: There is no use, your Honor, for me to prolong the matter any more. The Government feels the situation—and has no objection—is one where the doctrine of res ipsa loquitur applies * * *.

The Court: In view of what counsel for the Government said, I don't think it will be necessary to proceed any further. I will hold a prima facie showing has been made.

* * *

The Court: We can consider the record completed in the case, with the understanding that we had today * * * Is there anything else that you need to put in now? I have held that the doctrine of res ipsa loquitur applies. So the only legal question that remains is to whether or not there has been an election of remedy * * *

(Matter continued to January 26, 1951, 2 p.m.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing to the best of my ability.

/s/ H. CANNON.

[Endorsed]: Filed August 30, 1951.

Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal as designated by the parties:

Libel in Personam.

Answer of Respondent United States of America.

Opinion.

Supplementary Opinion.

Libelant's Proposed Amendments to Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Decree.

Notice of Entry of Decree.

Petition for Appeal.

Order Allowing Appeal.

Notice of Appeal.

Assignment of Errors.

Citation on Appeal.

Cost Bond on Appeal.

Supplement to Petition for Appeal.

Stipulation for Extension of Time in Which to Docket Apostles on Appeal.

Order Extending Time to Docket Apostles on Appeal.

Designation of Apostles on Appeal.

Counter-Designation of Apostles on Appeal.

3 Volumes of Testimony.

Libelant's Exhibits: Nos. 1, 2, 3, 4, 5, 6, 7 & 8.

Respondent's Exhibits: A-1, A-2, A-3; C-1, C-2, C-3; D-1, D-2, D-3; E-1, E-2, E-3; F-1, F-2, F-3; G-1, G-2, G-3; H; I-1, I-2, I-3, I-4, I-5, I-6, I-7; J, K, L, M, N, O, P, Q, R, S & T.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 16th day of August, 1951.

C. W. CALBREATH,
Clerk.

By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 13057. United States Court of Appeals for the Ninth Circuit. James C. Gibbs, Appellant, vs. United States of America, Appellee. Apostles on Appeal and Supplemental Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 16, 1951. Supplemental Apostles Filed September 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13057

JAMES C. GIBBS,

Libelant-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY PURSU-
ANT TO RULE 19 (6)

To the Honorable Justices of the Court of Appeals
for the Ninth Circuit, at San Francisco, Cali-
fornia:

Comes Now Appellant in the above-entitled mat-
ter and respectfully urges and asserts the following
errors in the findings of fact, conclusions of law,
decree and judgment of the Honorable Louis E.
Goodman, District Judge, which are herewith re-
cited as a statement of points upon which the ap-
pellant intends to rely.

I.

The Honorable District Court erred in refusing
to incorporate libelant's proposed amendments to
the findings of fact so as to include a finding that
the libelant was injured in the course of his em-
ployment on November 19, 1946, aboard the USS
Antietam, by reason of the negligence of the re-
spondent, United States of America. The respond-

ent having stipulated that the doctrine of *res ipsa loquitur* was applicable and the Court having so ruled, the failure of the respondent to introduce any evidence in explanation of the explosion which admittedly caused libelant's injury, there could be but one conclusion, to wit, that the injuries sustained by the libelant were proximately caused by the negligence of the respondent.

II.

The Honorable District Court erred in declaring that the mere acceptance of hospital and medical benefits by a shoreside civilian employee of the United States (prior to the 1949 Amendment to the FECA which made the remedy exclusive), was in and of itself an acceptance of "compensation" under the Federal Employees' Compensation Act of 1916.

III.

The Honorable District Court having erred in declaring the acceptance of hospital and medical benefits to be an "acceptance of compensation," erred further in then declaring that the acceptance of such "compensation" (hospital and medical benefits) was, *per se*, an Election of Remedies—and precluded libelant from pursuing a libel in admiralty under the Public Vessels Liability Act, 46 USCA, 781 *et seq.*

IV.

The Honorable District Court erred in concluding that hospital benefits and medical services are pro-

vided under the Federal Employees' Compensation Act and are part of the employee's compensation.

V.

The Honorable District Court erred in dismissing libelant's libel herein.

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 31, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER
AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee, acting by and through their respective proctors, that in order to save further costs of printing, all exhibits heretofore admitted in evidence herein need not be printed, and that the same may be considered by the Court in their original form.

Dated this 4th day of September, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ LEAVENWORTH COLBY,

/s/ KEITH R. FERGUSON,
Special Assistants to the Attorney General, Proctors
for Appellee.

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,
Proctors for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,

/s/ HOMER BONE,

United States Circuit Judges.

[Endorsed]: Filed September 7, 1951.